

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





SEP 1 - 1933

*Henry H. Hodges*  
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IN THE  
**Court of Appeals, District of Columbia**

No. 5810.

**281**

NORTHERN TRUST COMPANY, A BODY CORPORATE, AD-  
MINISTRATOR OF THE ESTATE OF ROBERT J.  
THOMPSON, DECEASED, *Appellant.*

*v.*

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN;  
W. O. WOODS, AS TREASURER OF THE UNITED  
STATES, AND REICHSBANK, *Appellees.*

**BRIEF FOR APPELLANT.**

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## INDEX.

|                                                                                                                 | Page |
|-----------------------------------------------------------------------------------------------------------------|------|
| Statement of Case .....                                                                                         | 1    |
| Errors Relied Upon .....                                                                                        | 5    |
| Propositions of Law .....                                                                                       | 7    |
| Argument .....                                                                                                  | 7    |
| Proposition I. Evidence established fund belongs<br>to German Government .....                                  | 7    |
| Laws Relating to Reichsbank .....                                                                               | 15   |
| Evidence shows Reichsbank merely agent for Ger-<br>man Government .....                                         | 17   |
| Status of Bridgeport Projectile Company .....                                                                   | 20   |
| Status of Z. E. G. ....                                                                                         | 23   |
| Letter from Finance Minister to Reichsbank re-<br>ferring to Z. E. G. ....                                      | 25   |
| Evidence offered under stipulation .....                                                                        | 29   |
| Exhibits 2 to 20—Correspondence between Banks<br>relative to transfer of fund .....                             | 32   |
| Correspondence between Reich Finance Minister<br>and Reichsbank .....                                           | 38   |
| Evidence shows a definite plan by Imperial Ger-<br>man Government .....                                         | 41   |
| Other Acts of Reichsbank Competent and show<br>nature of fund.....                                              | 43   |
| Failure of Reichsbank to adduce pertinent evi-<br>dence creates presumption of unfavorable tes-<br>timony ..... | 44   |



|                                                                                                                     | Page |
|---------------------------------------------------------------------------------------------------------------------|------|
| Question of Ownership subject to review.....                                                                        | 46   |
| Interest of German Government in Reichsbank..                                                                       | 48   |
| Proposition II. The Court erred in holding that<br>the Reichsbank was a private banking cor-<br>poration.....       | 50   |
| Proposition III. The Court erred in admitting<br>evidence not included in the stipulations....                      | 56   |
| Proposition IV. The Court erred in refusing to<br>grant the appellant's Motion to Take Testi-<br>mony.....          | 58   |
| Stipulation vacated for mistake or inadvertence.                                                                    | 59   |
| Stipulation may be vacated to prevent injustice..                                                                   | 62   |
| Stipulation broken by Reichsbank .....                                                                              | 63   |
| Proposition V. Though it be found that money<br>belongs to Reichsbank court erred in dismiss-<br>ing the bill ..... | 64   |

#### INDEX TO CASES IN BRIEF.

|                                                                                             |    |
|---------------------------------------------------------------------------------------------|----|
| Card vs. State, 109 Ind. 415 .....                                                          | 43 |
| Chicago, Milwaukee and St. Paul R. R. Co. vs.<br>Clark, 178 U. S. 365, 44 L. ed. 1099 ..... | 47 |
| Crosby vs. Buchanan, 23 Wall. 240, 23 L. ed. 137..                                          | 46 |
| Cunard S. S. Co. vs. Kelley, 115 F. 678.....                                                | 44 |
| Elston vs. Schilling, 42 N. Y. 79 .....                                                     | 28 |
| Fitzsimmons vs. Ogden, 7 Cranch 2, 3 L. ed. 249..                                           | 46 |
| Fling vs. Goodall, 40 N. H. 219 .....                                                       | 28 |
| Harvey vs. Thorpe, 28 Ala. 250 .....                                                        | 62 |

# Index Continued.

iii

|                                                                                  | Page |
|----------------------------------------------------------------------------------|------|
| Kirby vs. Tallmadge, 160 U. S. 369, 40 L. ed. 463                                | 46   |
| Landic vs. Simms, 1 D. C. App. 507                                               | 61   |
| Moy Jik vs. U. S., 47 App. (D. C.) 498                                           | 47   |
| Miller vs. Humphrey, 7 F. (2nd) 330                                              | 14   |
| Mudsill Mining Company vs. Watrous, 61 F. 163                                    | 44   |
| Phelps vs. Harris, 101 U. S., 380, 25 L. ed. 855                                 | 28   |
| Runkle vs. Burnham, 153 U. S. 216, 38 L. ed. 694                                 | 46   |
| Shipman vs. Straitsville Cent. Min. Co., 158 U. S.<br>356, 39 L. ed. 1015        | 47   |
| Swift & Co. vs. Hocking Valley R. Co., 243 U. S.<br>281, 61 L. ed. 722           | 61   |
| U. S. vs. Securities Corporation General, 55 App.<br>(D. C.) 256; 4 F. (2nd) 619 | 8    |
| Von Zedtwitz vs. Suterland, 58 App. D. C., 158<br>26 F. (2nd) 525                | 57   |
| Ward vs. Clay, 23 Pac. 50; 82 Col. 502                                           | 63   |
| Welsh vs. Noyes, 14 P. 317; 10 Colo. 133                                         | 63   |
| White vs. Mechanics Securities Corporation, 269<br>U. S. 283; 70 L. ed. 275      | 11   |





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**BRIEF FOR APPELLANT.**

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**STATEMENT OF CASE.**

This is an appeal from the final decree of the Supreme Court of the District of Columbia, holding an Equity Court, dismissing the appellant's Bill of Complaint.

The suit was originally filed by Robert J. Thompson (now deceased) pursuant to section 9 of the Trading



with the Enemy Act to establish a debt against the Imperial German Government as the purchaser and owner of certain bonds of the Imperial German Government payable in gold, legal tender cash of the par value of \$103,000 with interest thereon, and to have the defendant, Sutherland, satisfy said claim from funds in his hands belonging to the said Imperial German Government.

The fund or necessary part thereof against which the plaintiff is seeking to satisfy his claim originally amounted to approximately \$5,000,000, and was seized by the United States authorities on or about January, 1918, in the hands of Lee, Higginson and Company.

It is admitted by all parties that this fund had been on deposit with the National City Bank of New York to the ostensible account of the Aktiedolaget Sveriges Privata Centralbank, Stockholm, hereinafter referred to as the Swedish Bank, and that said account was transferred from the National City Bank to Lee, Higginson and Company on or about June 12, 1917. A few days before the outbreak of the war between the United States and Germany an effort was made to get this money out of this country and the method pursued was by a purported sale or exchange of said dollars into Swedish francs by the Swedish Bank to the Swiss National Bank; and it was pursuant to this transaction that the account was transferred from the National City Bank to Lee, Higginson and Company.

The Alien Property Custodian deposited this fund in the Treasury of the United States in Trust No. 9322 in the name of "Undisclosed Enemy No. 1." Thereafter on or about March 8, 1923, \$2,200,000 of this fund was determined by the Alien Property Custodian to be



money of the Imperial German Government and the same was paid to satisfy the holders of certain dollar notes of the German Imperial Government issued here during the war.

About the same time that the above case was filed in the Supreme Court of the District of Columbia, being Equity No. 51612 (hereinafter referred to as the Thompson case), the Reichsbank through its attorney in fact, Frank W. Mondell, filed a suit in that court entitled Reichsbank, a corporation vs. Howard Sutherland, as Alien Property Custodian, and Walter O. Woods, as Treasurer of the United States; Equity No. 51537 (hereinafter referred to as the Reichsbank case) pursuant to the amended provisions of Section 9 under the Trading with the Enemy Act, alleging in its bill that the Reichsbank was a private banking corporation of Germany and that it was the owner of the fund in controversy and hence entitled to the payment of said money held by the Alien Property Custodian as aforesaid.

The defendants below in the Reichsbank case filed their answer admitting that the Reichsbank was a private German banking corporation and thereafter through their attorneys entered into two stipulations with the attorneys representing the Reichsbank by which the parties to that suit agreed that the Exhibits attached to said stipulations should constitute the evidence in that case which stipulations are hereinafter referred to as appellees' stipulations.

Judge Edmund Burke, now deceased, attorney for the plaintiff below, in the above entitled case after unsuccessfully attempting to intervene in the Reichsbank case filed a motion to consolidate which was opposed by the attorneys for appellees but was even-



tually able to effect a limited order of consolidation for the purpose of determining the ownership of the fund in question, by agreeing that the evidence offered under the stipulation in the Reichsbank case should constitute the evidence in the Thompson suit. At the argument upon a motion for final decree by the Reichsbank, the counsel for the Reichsbank offered over the objection by appellant's counsel in these consolidated cases, an affidavit and certificate which were not offered under the stipulation. Thereafter the appellant, Thompson filed a motion to take testimony and attached to this motion exhibits consisting of certain evidence which the appellant proposed to offer with other evidence in the event the motion was allowed.

On June 8, 1931, the court filed its memorandum to the effect that it had considered all the evidence including that annexed to and made a part of the motion to take testimony and the pamphlet entitled "German Imperial Banking Laws", as though it were legally before him and had reached the conclusion that he would make the same finding of fact as that filed in the Reichsbank case, *i. e.*, that the money in question belonged to the Reichsbank, a private banking corporation. The Court further suggested that counsel enter into a stipulation that the evidence annexed to the motion to take testimony and the said pamphlet be considered as formally offered, in which case he would adopt the same findings as that filed in the Reichsbank Case. Such a stipulation was entered into and the Court made findings of fact, conclusions of law, and a final decree was entered dismissing the bill of complaint.

The errors relied upon are as follows:



**ERRORS RELIED UPON.**

1. In dismissing the amended Bill of Complaint.
2. In dismissing the said amended Bill of Complaint in that said decree was contrary to the evidence.
3. In finding that the fund in controversy did not belong to the German Government.
4. In finding that the fund in controversy was not subject to the debts of the Imperial German Government.
5. In finding that the fund in controversy belonged to the Reichsbank.
6. In finding that the Reichsbank was a private banking corporation.
8. In failing to find that the Reichsbank during said period was an agent of and/or controlled by the German Government.
11. In finding that said funds belong to the Reichsbank in that it appears from the evidence in the case that the Reichsbank had violated the provision of the Trading with the Enemy Act and therefore said fund had been and was subject to forfeiture.
12. The Court erred in admitting over the objection of the plaintiff Thompson, evidence offered by the Reichsbank which was not included in the stipulations.
13. For error in admitting said evidence in that the same was ex parte, hearsay and not properly authenticated.
14. The court erred in denying the plaintiff, Thompson's amended motion to take testimony.



15. For error in denying said motion in that said stipulation had already been vacated by the offer on the part of Reichsbank and by the admission of the court over objection of the plaintiff, Thompson of evidence other than that included in the stipulations.

16. For error in denying said motion in that it was apparent from the evidence offered under the stipulations that all of the evidence bearing on the ownership of said fund and the issues presented in the case was not before the court and that other material evidence was readily available.

18. In that it appeared from said motion that the Reichsbank and the Alien Property Custodian had omitted from the evidence offered under said stipulations vital and material evidence bearing upon the ownership of said fund and the issues in controversy which said evidence omitted tended to show that said fund in controversy was property subject to the debts of the German Government.

19. The court erred in requiring by its memorandum opinion, dated June 8, 1932, the plaintiff, Thompson to stand on the evidence already offered under penalty of otherwise vacating the order of consolidation.

It will be noted that the seventh, ninth, tenth and seventeenth assignments of error are not relied upon in this brief.

The propositions of law involved in this case are the following:



## PROPOSITIONS OF LAW.

1. That the Evidence Clearly Establishes That the Fund in Controversy Belonged to the Imperial German Government and Therefore the Court Erred in Dismissing the Appellant's Bill of Complaint.

2. The Court Erred in Holding That the Reichsbank Was a Private Banking Corporation.

3. The Court Erred in Admitting in Evidence the Affidavit and Certificate Offered by Counsel for the Reichsbank Which was not Included in the Evidence Offered Under the Stipulation.

4. That Under all the Facts and Circumstances in the Case the Court Erred in Refusing to Grant Appellant's Motion to Take Testimony.

5. Even Though it Should be Found that the Money in Controversy Belongs to the Reichsbank the Court Erred in Dismissing Appellant's Bill of Complaint Because said Finding Does Not Preclude Appellant from Satisfying Its Claim Against Other Monies of the Imperial German Government in the Hands of the Alien Property Custodian.

## ARGUMENT.

### I.

**THAT THE EVIDENCE CLEARLY ESTABLISHES  
THAT THE FUND IN CONTROVERSY BE-  
LONGED TO THE IMPERIAL GERMAN GOV-  
ERNMENT AND THEREFORE THE COURT  
ERRED IN DISMISSING THE APPELLANT'S  
BILL OF COMPLAINT.**

This proposition of law embraces the first, second, third, fourth and fifth assignment of error relied upon.



It is at once apparent that the decision in these consolidated cases turned upon the determination by the court of the ownership of the fund in controversy. This was the only question to be determined under the order of consolidation. If the money belonged to the Reichsbank and Reichsbank was a private banking corporation then the Reichsbank was entitled to a decree in its favor. On the other hand, if the money belonged to the Imperial German Government, then the Reichsbank was not entitled to a decree and the Bill of Complaint in the Thompson case should not and would not have been dismissed.

It is appellant's contention that the evidence in this case establishes that this fund seized by the Alien Property Custodian was within the meaning of Trading with the Enemy Act, moneys belonging to the Imperial German Government. The meaning of ownership in this respect is well established both by the terms of the Trading with the Enemy Act and by judicial construction.

In *U. S. vs. Securities Corporation General*, 55 App. (D. C.) 256; 4 F. (2nd) 619, involved a part of the very fund, which is the subject matter of these suits, the Alien Property Custodian having transferred \$2,200,000 from Trust No. 9322—"Undisclosed Enemy No. 1" to Trust No. 555—"Special Imperial German Government." The plaintiff, a holder of certain overdue and unpaid dollar notes issued by the Imperial German Government, was seeking to recover its debt out of this fund. This Court in determining that such money was "owned" by the Imperial German Government and hence subject to be paid in satisfaction of the plaintiff's debt on page 623 of 4 F (2nd) said:



“ \* \* \* It amounted to a finding, after investigation, that the fund should be held ‘*for, by, on account of, or on behalf of, or for the benefit of*’ the Imperial German government. (Italics ours)  
 \* \* \* The Custodian then, exercising the power imposed upon the President, determined specifically the enemy ownership of this fund.”

Therefore, irrespective of the ostensible ownership of this fund, if this money was in this country for the benefit of the Imperial German Government subject to the use and at the disposal of that government through its agents and being so used by said Government, then within the meaning of the Trading with the Enemy Act, it constitutes money belonging to that Government. It is admitted that this money did not belong to the party to whose account it is credited, to wit, the Swedish Central Bank. Its ownership therefore must be determined by the control and right of disposal over the money and this is determined by the purpose of the fund concealed in this country as aforesaid and the uses to which it was being put. The evidence under the stipulations is entirely silent as to the salient facts and circumstances relating to the fund but it is submitted that this evidence, in conjunction with the evidence offered by the appellant, Thompson, conclusively establishes that this fund was in this country by direction of the Imperial German Government and was over here solely for governmental purposes to be utilized in the promotion of the German cause during the World War. Such being the case, it is submitted that it was money either for, on account of, on behalf of or for the benefit of the Imperial German Government and hence subject to be used in satisfaction of appellant's claim.



Before discussing the evidence in detail, we desire at the outset to bring to the attention of this Court the fact that \$2,200,000 of this \$5,000,000 fund has been judicially found to be funds belonging to the Imperial German Government by the Alien Property Custodian, the Supreme Court of the District of Columbia, the Court of Appeals of the District of Columbia, and lastly, by the Supreme Court of the United States.

In determining the ownership of this fund, this Court, on page 622 4 F (2nd) said:

“Coming now to the question of the sufficiency of the evidence adduced by plaintiffs to sustain the judgments of the court in the respective cases, there appears in paragraph 8 of the bill of complaint the following allegation: ‘That the Alien Property Custodian now has in his possession or to his credit in the Treasury of the United States funds of the Imperial German government, which were paid and delivered to him under the provisions of said Trading with the Enemy Act, as amended, and which are available by law, sufficient to pay the entire indebtedness, both principal and past due interest owing to complainant.’

“The defendants, answering this paragraph, alleged that they had no knowledge or information sufficient to form a belief with respect to the averments of paragraph 8 of the bill of complaint, and therefore demand strict proof thereof. In support of this averment of the plaintiffs, the answer filed by the defendants Miller and White in the case of *Mechanics’ Securities Corporation v. Frank White*, as Treasurer of the United States, and Thomas W. Miller, as Alien Property Custodian, then pending in the Supreme Court of the District of Columbia, and submitted on this appeal as No. 4195, was offered and received in evidence over objection and exception by defendants.



The answer in that case, made under oath by the defendants, set forth that the Custodian had turned over to the Treasurer \$515,571, which was deposited in Trust No. 555—Special, 'Imperial German Government,' and that there had been transferred to the same trust \$2,200,000 from Trust No. 9322, 'Undisclosed Enemy No. 1,' making a total credited to Trust No. 555—Special, 'Imperial German Government,' of \$2,715,571. The status of these respective trusts was also shown by true copies of record entries from the Treasury Department, which were put in evidence."

The decision in this case was affirmed on appeal to the Supreme Court of the United States. *White vs. Mechanics Securities Corporation*, 269 U. S. 283; 70 L. ed. 275. Mr. Justice Holmes, page 280 of 70 L. ed., said:

"With regard to the evidence, the contention on behalf of the United States does not seem to us to need more than a word of reply. The facts admitted by answer under oath of the Custodian and the Treasurer in one of the cases were that the Custodian determined after investigation that five hundred and fifteen thousand five hundred and seventy-five dollars were owing to the German Government, that he demanded and received them under the Act, paid them to the Treasurer, and holds them in a special trust; that he afterwards collected and paid over to the Treasurer five million dollars in a special trust as from an unknown enemy, but later determined that two million two hundred thousand dollars of the latter sum were held *when he received them for the Imperial German Government*, and directed the Treasurer to transfer that amount to a special account to the credit of the Imperial German Government, and that this was done." (Italics ours)



The answer filed in Miller vs. Mechanics Securities Corporation was offered and admitted in evidence in the case at bar.

There has been no attempt by the Alien Property Custodian to show a segregation of the original fund of \$5,000,000 or to show how or why the \$2,200,000 of the fund belonged to the Imperial German Government and the balance of \$2,800,000 belonged to the Reichsbank. The fund was and always has been intact and indivisible and the admission by the Alien Property Custodian that a part of the fund belonged to the Imperial Government at the time of its seizure necessarily involves the admission that the entire fund is likewise so owned.

The theory of the appellees in their defense of this suit is that this finding of ownership in the Imperial German Government by its predecessor in the office of Alien Property Custodian and the decision of the courts above enumerated, was erroneous and that in fact the entire \$5,000,000 is and always has been owned by the Reichsbank and not the German Government, and the Trial Court in reaching its decision found this to be the fact as further appears from the finding of fact, reading in part as follows:

“2. The said fund claimed by the Reichsbank and which amounted to \$5,075,951.78 was seized by the Alien Property Custodian from Lee, Higginson & Company in January, 1918, and the same was deposited by the Custodian in the Treasury of the United States in Trust No. 9322 in the name of “Undisclosed Enemy No. 1.”

“3. Neither the Imperial Government of Germany nor the German Republic has ever been the owner of the said funds, above described, *or any*



*part thereof*, and neither of said Governments has ever claimed any right, title or interest in or to said funds. (Italics ours)

“4. The Imperial Government of Germany was not the owner of the credit balance of \$5,075,951.78 with Lee, Higginson & Company at the time of the said seizure of said credit balance by the Custodian in January, 1918, as the property of “Undisclosed Enemy No. 1”, or *any part thereof*.” (R. 18 and 19) (Italics ours.)

The decision of the Court below was evidently based upon the evidence offered under the stipulations entered into between the Reichsbank, through its attorney in fact, Frank W. Mondell and the attorney for Howard Sutherland, the Alien Property Custodian.

This evidence consisted of excerpts of testimony from the case of Equitable Trust Company vs. Miller, *et al.*, filed in the United States District Court of New York, said excerpts being parts of the testimony of officials and employees of the Reichsbank. There was also offered under the stipulation purported copies of letters between Reichsbank and the Central Bank of Sweden and also purported correspondence between the Bank of Sweden and the Swiss National Bank, all of which correspondence pertains to the attempted transfer of the dollar account in question. Several affidavits were also offered under the stipulation and lastly, purported copies of certain letters between the German Government and the Reichsbank beginning August, 1921, over three and one-half years after the seizure, and ending in October, 1926.

Other than the mere general claim of ownership the only tangible facts shown by all of this evidence to establish ownership is that the Swedish Central Bank



carried this account to the credit of the Reichsbank and that the Reichsbank on the information furnished it, had a record on its books of the account (although some of the entries were not made until about two years after the transaction as will hereinafter be seen). This, of course, is by no means conclusive as shown by the fact that to establish the Reichsbank's claim it was necessary to sweep aside any inference of ownership that might arise from the fact that this account stood in the name of the Swedish Central Bank on the books of the National City Bank. None of the accounts, however, or copies thereof were offered in evidence and this information comes either by oral testimony or affidavits. Assuming however, that the account stood in the name of the Reichsbank, such evidence is by no means conclusive and true ownership may be established regardless of the name in which an account might stand. *Miller vs. Humphrey*, 7 F (2nd) 330.

It is true that the evidence offered under appellees' stipulation shows the Reichsbank to be a private banking corporation. If that fact were established and it was shown that this alleged private bank had money to its credit in this country these facts in the absence of other evidence might make out a *prima facie* case of ownership on the part of such private bank. It is apparent from the record that the Reichsbank case was entirely a friendly one and had not the Thompson case been consolidated, this evidence might have warranted the Court in deciding that the money belonged to the Reichsbank.



### Laws Relating to Reichsbank.

However, the appellant Thompson, has offered in evidence the laws by which the Reichsbank was created and the statute governing its operations which establishes beyond any doubt that the Reichsbank was not a private corporation, but was a mere agency entirely controlled by the German Government having in fact, charge of the Imperial Treasury and handling the receipts and disbursements of the Imperial Government.

The proof of the governmental character of the Reichsbank is set out under the next proposition. We think it is necessary at this time, however, to point out certain provisions of the law creating the Reichsbank and the status promulgated by the German Emperor by the authority conferred upon him by the Bank Act which statute appears analogous to the by-laws of corporations organized in this country. The statute creating the Reichsbank provides:

“The name “Reichsbank” is given to the bank which is subject to the supervision and direction of the Empire, and which possesses the right of a legal person. Its duty is to regulate the monetary circulation of the whole Empire, to facilitate payments, and to utilize available capital.” (Section 12, Bank Act, 1875, R. 143)

A dividend of  $3\frac{1}{2}$  per cent of the capital was to be distributed among the shareholders.

“After 10 per cent of the balance has been transferred to the reserve fund the new balance shall be distributed in the proportion of one-fourth to three-fourths among the shareholders



and the imperial treasury, respectively.” (Article I, Law of June 1, 1909, Concerning Changes in the Bank Act, R. 234-235)

(Section 11, R. 201 of the Reichsbank Statute.)

“The Reichsbank is required to take charge of the imperial deposits without compensation (sec. 22 of the Bank Act), and also to keep records of the sums received and disbursed for the accounts of the Empire.”

Section 22, Article 7, of Law of 1909 Concerning Changes in Bank Act (R. 239).

“The Reichsbank is required to take charge of the business of the Imperial Treasury without compensation.”

Section 26 of the Bank Act 1875 and Section 27 of the same (R. 148-149).

“Sec. 26, The Empire is to direct the Bank through the Imperial Chancellor, and the subordinate Reichsbank board of directors. In case the Imperial Chancellor is prevented from exercising his duty, the latter is to be assumed by a deputy named for that purpose by the Emperor.

The Imperial Chancellor is to direct the whole bank management according to the provisions of this Act and the statute to be enacted (sec. 40). He is to ordain the business instructions for the Reichsbank board of directors and for the branch offices, as well as the rules and instructions for the officials of the Bank; and he alone can authorize the necessary changes in the existing business regulations and instructions.

“Sec. 27. The Reichsbank board of directors is the managing and executive authority, as well as the official representative of the Reichsbank.



“It is to consist of a president and the necessary number of members. Its orders are to be sanctioned by a majority vote, and subjected to the instructions and directions of the Imperial Chancellor.

The president and the members of the Reichsbank board of directors are appointed for life by the Emperor, on the nomination of the Bundesrat.

“Sec. 28. The officials of the Reichsbank have the rights and duties of imperial functionaries.

The salaries, pensions, and other remuneration for service, as well as the pensions of the surviving heirs of the officials, are to be paid by the Reichsbank. The salaries and pensions of the Reichsbank board of directors are to be fixed annually in the Imperial Budget; the salaries of the other officials are fixed annually by the Emperor, in conjunction with the Bundesrat, on the recommendation of the Imperial Chancellor.

No official of the Reichsbank may hold shares of the same.”

### **Evidence Shows Reichsbank Merely An Agent for German Government.**

From the above it will be seen that the Reichsbank is under the absolute control and direction of the Imperial German Government through its chancellor who is ex-officio head of the Reichsbank. The Reichsbank handles the Treasury's business of the government, accepts revenue and makes disbursements on behalf of the government. Such being true, a check from the Reichsbank or even an account in its name would tend equally to prove that the fund belonged to the German Government, if the Reichsbank was in fact an entity apart from the German Government. So that the fact that the account was created on the books of the



Swedish National Bank to the credit of the Reichsbank by no means establishes ownership on the part of the Reichsbank. Nor does the fact that such account appears on the books of the Reichsbank establish such fact.

It must be further borne in mind that this account was ingenuously concealed through the co-operation of the Swedish National Bank. (We think the Court will take judicial notice that Sweden was friendly to the Central Powers during the World War.) If the Reichsbank was engaged in a private banking business as the Alien Property Custodian and Reichsbank contend, there was no reason for the concealment of this fund prior to the outbreak of the war with the United States. The evidence offered under the stipulation shows that this fund had been concealed in this manner since April 25, 1916 (R. 59) more than a year prior to the attempt to effect the transfer.

It is well known that millions of dollars of money and property belonging to German Nationals and German Corporations were in this country up to the date of the outbreak of the War with this country. For example, the German shipping interest, insurance corporations, etc., (R. 74) had in this country millions of dollars in money and property and were engaged in the performance of their usual business in the United States, a neutral country up to April 6, 1917, the date of our entrance into the War. What possible reason then can be given for the concealment of this fund over a period of about a year if the Reichsbank was, as it claims, engaged in a legitimate private banking enterprise and if so, why will not the Reichsbank tell us the nature of that enterprise? Why was this fund here? That question has remained unanswered throughout



the entire evidence offered under appellees stipulations. No other reason can be given except that it was here at the disposal of the German Government in the promotion of the German cause in the War.

The evidence in this case offered by appellant shows abundantly that the Reichsbank was actively engaged in financial operations in the United States but never in a single instance in the capacity of a private banking corporation but always in its capacity as an agent of the German Imperial Government. This appears from the testimony of Mr. Borgemeister, "the bookkeeper of the Albert Office, who has immediate charge of the records of all financial transactions, and who took care of the book accounts and disbursing of funds under Dr. Albert's direction." (R. 75)

Dr. Heinrich Albert, above referred to had charge of the propaganda in this country and the shipping of materials to Germany and who received and spent in the country over \$35,000,000 in the carrying out of these operations. (R. 73 and 74)

Mr. Borgemeister testifying from an itemized report stated as follows:

"Item 12. \* \* \* Remittance from Reichsbank for account of the Zentral Einkaufs Gesellschaft. \$3,500,000. (R. 76)

'Q. What do you mean by that? A. The Zentral Einkaufs Gesellschaft requested the Reichsbank at various intervals to make payments to our office, and the total aggregated about \$3,500,000.

'Q. How did you obtain these remittances? Direct from the Reichsbank? A. They would instruct their correspondents here in New York to make the payment to us."

\* \* \* \* \*



"Item 13. Remittance from the Reichsbank for the redemption of Treasury notes of April 1, 1915, \$7,000,000.

'Q. How was that made, Mr. Borgemeister?

A. The Reichsbank made the remittance through the Guaranty Trust Company, I believe, for the payment of the notes maturing the 1st of January, 1916.

'Q. And this was to pay the previous items of these notes, April 1, 1915? A. Correct.

'Q. And that fund was applied toward that payment? A. Yes, quite correct."

"Item 14. Remittance from the Reichsbank for account of Bridgeport Projectile Company \$1,200,000.

'Q. How was that fund placed, Mr. Borgemeister, so it was available? A. The Reichsbank apparently made an arrangement with the Deutsche Bank to place the amount in monthly installments to the credit of Dr. Albert, and the funds were received to the extent of \$1,200,000.''  
(R. 77)

\* \* \* \* \*

### **Status of Bridgeport Projectile Company.**

In respect to this \$1,200,000 remittance from the Reichsbank to the Bridgeport Projectile Company, the testimony of Carl Heynen is significant. Who was Mr. Heynen? This gentleman is first mentioned in the evidence offered under appellees' stipulation in the correspondence beginning in 1921 between the German Government and the Reichsbank to secure a release of the part of the fund already referred to. The letter from the Reichsfinanzminister to the Reichsbank, dated August 18, 1921, reads in part as follows:

\* \* \* \* \*



“Assuming your assent herewith, I beg to empower by signing the enclosed assent and power of attorney, Mr. Carl Heynen, New York, to procure the release of the funds \* \* \* .” (R. 62-63)

This power of attorney was in fact executed. Said power in fact reading as follows:

“Know all men by these presents that the Reichsbank \* \* \* does hereby make, constitute and appoint Carl Heynen \* \* \* its true and lawful attorney \* \* \* to take any and all action in conformity with the provision of Section 9 of the Trading with the Enemy Act” \* \* \* . (R. 67)

George P. Lester, Captain, United States Army, Military Intelligence Division of the General Staff, testified regarding the deposition of Carl Heynen as follows: (R. 75)

“This is the deposition of Carl Heynen, who came to this country in April, 1915, for the purpose of assisting Dr. Albert in carrying on the commercial and financial affairs of the German Government. Heynen’s main work for Dr. Albert was assisting in the purchasing of shipments of goods to Germany, by way of Sweden, Switzerland and Holland from the United States, and to charter or buy vessels for that purpose.’ \* \* \* This deposition was taken on October 6, 1918, and purports to be a computation made up by Mr. Borgemeister, and Mr. Heynen, of actual cash that passed through Dr. Albert’s office, and the purpose for which the money was used, and in most cases the source from which the money was obtained.”



Mr. Heynen testified with respect to this transaction as follows: (R. 77)

“Q. What was done with that fund of one million two hundred thousand dollars paid over to the Bridgeport Projectile Company?”

“Mr. Heynen: It was used as part payments which became due to the Bridgeport Projectile Company as per our contract with them.

“Q. What was that contract, Mr. Heynen?”

“Mr. Heynen: For the manufacture of two million shrapnel cases.”

“The Bridgeport Projectile Company was a large munitions factory, located in Bridgeport, which was entirely financed by the German Government, the object being to tie up the powder supply in part, to get a monopoly for a certain time of certain kinds of presses that were used in the manufacture of munitions. The German Government put into it through Albert’s office, as I recall, \$3,400,000.” Borgemeister’s testimony (R. 82)

Testimony of Mr. Konta (R. 82) as to the Bridgeport Projectile Company:

“Q. You knew that this concern was practically owned by the German Government, did you not? A. Quite so.

“Q. You knew that the Bridgeport Projectile Company was organized for German purposes? A. Quite true.”

Testimony of H. Bruce Bielaski, Chief of the Bureau of Investigation, Department of Justice, in testifying as to the items making up the \$35,000,000 handled by Dr. Albert’s office testified as follows: (R. 74)



“Remittances from Reichsbank, Department of Interior, War Department and Central Purchasing Agency of Berlin, approximately \$7,000,000.”

### **Status of Z. E. G.**

The character of the Central Purchasing Agency being the translation of the Zentral Einkaufs Gesellschaft, sometimes referred to as the Z. E. G. is fully shown and admitted by appellee in the evidence (R. 77 to 81). As previously shown the Reichsbank remitted to the Z. E. G., \$3,500,000 and the Z. E. G. in conjunction with the Reichsbank, Department of Interior and War Department of Germany remitted to Dr. Albert's office \$7,000,000 for the furtherance of these activities in this country in the prosecution of the War. (R. 74)

Counsel for the Alien Property Custodian has made the following admission as to what the Z. E. G. was: (R. 81)

“Counsel for the defendants, Alien Property Custodian and Treasury of the United States, admitted at the hearing of this cause that the Z. E. G. was the Zentral Einkaufs Gesellschaft, m. b. H., and that in January, 1915, it took over the business, assets and liabilities of the Reichseinkauf, and thereupon became the Central Purchasing Agency of the Imperial German Government, and that the original capital stock of the Zentral Einkaufs Gesellschaft, m. b. H., was principally subscribed for by the Imperial German Government, the German states and the free cities of Hamburg, Bremen and Lubeck, a small percentage of seven-tenths of one per cent thereof being owned by private individuals, firms and corporations, and that said corporation was organized



under Governmental direction and was a Governmental agency of the Imperial German Government.” (R. 81)

It further appears from the evidence considered by the Trial Court (R. 79)

“That said corporation was organized under Governmental direction: that it was a Governmental agency and that the representative of said corporation in the United States was H. F. Albert, Commercial Attache of the Imperial German Government; that said corporation during the period of the world war acted as a purchasing agent for the Imperial German Government.

\* \* \* \* \*

“That the greater part of the business of said corporation in the United States was conducted through the office of H. F. Albert, which was designed as the Commercial Office of the German Embassy; that when supplies and raw materials purchased by the corporation arrived in Germany, they were distributed under Governmental supervision and regulation; that said corporation transacted no business other than for the benefit of the Imperial German Government or its people in the supply of goods as heretofore stated; that it was not conducted for profit and was intended to be, and was, mainly a German Governmental agency and handled its business for the German Government and its people.

“That in addition to the corporation’s original capitalization, purchases made through it were financed by the Imperial German Government, and, in some instances, by the German State Governments and funds furnished it with which to buy supplies and raw materials.

“That a large percentage of the proceeds of said series of notes sold in the United States in



1916 to citizens thereof, were turned over by the German Embassy and placed to the credit of the Zentral Einkaufs Gesellschaft and used by it in the purchase of supplies and raw materials for the Imperial German Government." (R. 79)

It further appears in October, 1926, that the German Government had taken over the Z. E. G. together with its assets and liabilities and the corporation was dissolved pursuant to Law (R. 81).

That the effect of the action of the German Government "was to completely dissolve and extinguish the said Zentral Einkaufs Gesellschaft, and destroy and put an end to its corporate entity and to vest the legal title to all of the assets and liabilities of said Zentral Einkaufs Gesellschaft in the German Government." (R. 81)

**Letter from Finance Minister to Reichsbank Referring to Z. E. G.**

Having shown the Z. E. G. to be a mere agency of the Imperial Government, the reference to this company contained in the letters passing between the Minister of Finance of Germany and the Board of Directors of the Reichsbank offered in evidence under the appellees' stipulation is of significance. As will be hereinafter shown, this entire correspondence was entirely inadmissible and should have been excluded by the trial court. However, any admissions against interest are properly admissible, and to that end we desire to refer to the first letter in this chain of correspondence from the Reichsfinanzminister to the Reichsbank-Direktorium. Exhibit 1-B. (R. 62.) This letter purports to be a request by the German Govern-



ment to the Reichsbank to assent the release of the aforesaid fund held by the Alien Property Custodian. This letter is as follows:

“Berlin, August 18th, 1921.

“It is in the interest of the German credit in the United States, to pay as soon as possible the treasury notes issued there during the war, which have become due in the meantime. A direct payment by the Empire is out of question; but I have no objection to a payment by compensation against funds seized by the Alien Property Custodian. I have been told that he would be inclined to satisfy claims of American owners of German treasury notes—only those are under consideration now—who have united themselves for the purpose of bringing forward their claims for these treasury notes, by releasing a corresponding amount of German Government and other funds. So far known here, there are still funds of the Z. E. G. proceed-  
Reichsbank

ings from the sale of the notes. I ask to place these funds again to the disposal of the Empire. So far the funds have been paid by the Z. E. G.  
Reichsbank

formerly the Empire would have to return the counter-value at the same rate at the settlement later on. Assuming your assent herewith, I beg to empower by signing the enclosed assent and power of attorney, Mr. Carl Heynen, New York, to procure the release of the funds, which should be paid by the Alien Property Custodian directly to the American owners of German treasury notes. Both enclosures please return after signing and affixing your company's seal. The necessary legalization by the Spanish Embassy I shall have procured by the Foreign Office. The latter will have to guarantee to the Spanish Embassy the genuity of signatures and the right of representation of the persons who signed.”



The letters "Z. E. G." and the word "Reichsbank" appearing twice in the above letter appear in the original letter in German "Z. E. G." (R. 91).

Reichsbank

Therefore, to the best of the knowledge of the German Government, there were still funds in the hands of the Z. E. G. from the sale of the treasury notes

Reichsbank

issued by the German Government, sold in the United States to citizens of this country during the war and this is the fund seized and held by the Alien Property Custodian in Trust No. 9322. The Z. E. G., or Zentral-Einkaufs Gesellschaft, or Central Purchasing Agency, was as have been shown, purely the agent of the Imperial German Government in the purchase of supplies for Germany, and the purchase of these supplies was financed in a large measure by the sale of dollar notes. From the above letter of the Minister of Finance it appears that this fund was designated as the Z. E. G. Fund.

Reichsbank

No other meaning can be ascribed to the language employed, and no attempt has been made by the Alien Property Custodian or by the Reichsbank to explain this language or to place a different construction upon it than that which naturally appears.

It will be further noted in this letter that the Reichsfinanzminister states, "I ask to place these funds *again* to the disposal of the Empire." By being placed at the disposal of the Empire, he means that these funds be held "for, by, on account of, or on behalf of, or for the benefit of, the German Government" to pay the obligations of the German Government on its dollar notes. The words, "at the disposal of," is an expression frequently used throughout the written evidence



offered under the stipulation and is synonymous with actual ownership.

In a letter from the Reichsbank-Direktorium to the Aktiebolaget Sveriges Privata Centralbank, Stockholm, dated July 21, 1917, relative to the proposed transfer of \$5,000,000, it is stated (R. 44) "we ask to urge the Nationalbank to put the counter-value of Swiss-francs as soon as possible at *our disposal*." (Italics ours) In a letter from the Schweizerische Nationalbank to the Aktiebolaget Sveriges Privata Centralbank, Stockholm, dated July 2, 1917 (R. 58), it is said: "As you see from the above cable, the definite credit of the transferred amount is put quite in question and therefore we are not in a position to put this amount *at your disposal*." (Italics ours.)

The term "at your disposal" means what the term fairly imports, the right to dispose of at will or the free and unlimited control of the fund in question. The term "dispose" is defined in Bouvier's Law Dictionary (Rawle's Third Revision) Vol. 1, p. 888, as follows:

"To alienate or direct the ownership of property, as, disposition by will. *Elston vs. Schilling*, 42 N. Y. 79; see *Fling v. Goodall*, 40 N. H. 219; *Phelps v. Harris*, 101 U. S. 380, 25 L. ed. 855."

The German Government, however, asks that the fund in question held by the Alien Property Custodian *again* be placed at the disposal of the Empire, meaning unquestionably that said fund prior to its seizure *was* at the disposal of the Empire in exactly the same sense that it is sought to be again placed, to-wit, to be used and spent as the Empire should direct.



### **Evidence Offered Under Stipulations.**

We have already shown that this evidence is not only altogether inconclusive to establish the ownership of the fund, within the meaning of the Trading With The Enemy Act, in the Reichsbank, but that it is equally persuasive in establishing the fact of ownership of the fund in the Imperial German Government. However, taking its evidentiary value in establishing ownership in the Reichsbank for what it is worth, we think it not improper at this time to call attention to the character of this evidence and the manner in which it was offered.

The evidence consists in the first place of excerpts from the depositions taken in the case of Equitable Trust Co. v. Reichsbank, being the depositions of the officials of the Reichsbank taken in August, 1924. The pleadings in that case were not included in the evidence offered under appellees' stipulations but were offered under appellant's evidence, and the substance thereof is in the record. (pp. 86-87). From these pleadings it will be noted that the plaintiff, the Equitable Trust Co., is seeking to satisfy a claim of \$850,000 against the Reichsbank out of the \$5,000,000 fund held by the Alien Property Custodian. In that case the bill alleges that said fund belongs to the Reichsbank. The Reichsbank in its answer admits all of the allegations in the bill of complaint. So that it will be seen that this Equitable Trust Co. case was entirely a friendly one, and obviously so since had the Equitable Trust Co. prevailed in that case it would have amounted to a judicial finding that the Reichsbank was entitled to the fund held as Trust No. 9322. Under such circumstances the evidence in the Equitable Trust Co. case should be viewed.



with suspicion, especially so since all the witnesses were officials of the Reichsbank.

In this stipulation the attorney for the Alien Property Custodian and Frank W. Mondell, as attorney for the Reichsbank, stipulated "that said excerpts contain all of the testimony given by Mr. Kauffman, Mr. Seidel, and Mr. Reep relating to the ownership of the money which is the subject-matter of this suit and the status of the Reichsbank." (R. 33.) It is apparent from the reading of this testimony that this is not correct. The testimony refers to certain entries in the books of the Reichsbank apparently relating to this fund on the books of the Reichsbank, without the production of the books or copies of such entries. There is no cross-examination of Mr. Willy Seidel, and no direct examination of Mr. Kurt Reep. The entire excerpt of the testimony covers four and one-half pages. (R. 43-47.)

There is, however, no question that appellees did not offer under their stipulation all of the testimony of Mr. Seidel, and Mr. Reep because appellant attached to its motion to take testimony further evidence of Mr. Seidel and Mr. Reep relating to the fund in controversy and the status of the Reichsbank and this was considered as evidence in the case. (R. 83-84-85.) Particular attention is called to the fact that the excerpt of Carl Reep's testimony was offered under appellee's stipulation, as follows: "The Reichsbank is a stock company founded on private capital, the German Reich did not participate in the Reichsbank itself." That this was true on January 31, 1917, the German Government and the Reichsbank being two separate institutions, its shares of stock being issued to private persons, which is the case today and they can be bought on the stock exchange, and the Ger-



man Government owned no stock in the Reichsbank. This constitutes the substance of the entire testimony of Mr. Reep. The only other evidence of the status of the Reichsbank appears in the affidavit of Carl Ruppel, who swears that from 1917 to June, 1928, the German Empire or Government was never registered as a shareholder in the register of the Reichsbank.

Without impeaching this testimony the failure on the part of the appellee to produce the entire evidence regarding the status of the Reichsbank has the effect of creating an entirely erroneous conception of what the Reichsbank really was. This has already been shown by the banking laws previously referred to. But the point we desire to make here is that the portion of Mr. Reep's testimony produced under the stipulation purporting to be all of the testimony relating to the Reichsbank did not in fact constitute all of his testimony on this question as appears from the following portion of Mr. Reep's testimony omitted under appellee's stipulation but offered by appellant and afterwards considered by the trial court as follows:

“The Government had supervision over the Reichsbank so that the members of the Reichsbank-Direktorium had to be paid by the Government.” (R. 83)

It further appears, as will hereafter be shown (p. 34 and 35 Brief), that a large portion of Mr. Seidell's testimony bearing on the account was omitted from the testimony offered under appellee's stipulation but set out by appellant and subsequently admitted in evidence by the court. (R. 83-84-85.)



It does not appear from the record that the Equitable Trust Co. was successful in its suit in establishing its claim to this fund or that the evidence offered in that case was sufficiently strong to justify the court in passing a decree in its favor establishing ownership of the fund in controversy in the Reichsbank but the Reichsbank, in the suit here, by selecting certain favorable portions of the testimony and by omitting other portions are endeavoring to prove their case on that record in this jurisdiction.

**Exhibits 2 to 20, Correspondence Between Banks Relative to Transfer of Fund.**

It does not appear that these letters were offered in evidence in the Equitable Trust Co. case. How they came into the hands of the Reichsbank or who verified the correctness of the copies or whether the entire correspondence relating to the fund was included in these exhibits are matters which have not been shown by appellee and appellant was afforded no opportunity to determine. Let us see, however, what the letters actually show. They show in the first place a fund of \$5,000,000 on deposit with the National City Co. to the ostensible account of the Swedish Central Bank. A few days prior to the war there is an endeavor to get this fund out of the country through the agency of neutral banks. The Reichsbank in its letter to the Swedish Bank cautions the Swedish Bank to use their own name and "to care for not mentioning our name in your letter." (R. 47.) The Swedish Bank in reply states that it will execute the offer but must expressly decline every risk in case the National Bank should request a declaration (obviously a declaration



of neutrality). Neither the Reichsbank nor the Swedish Bank know the exact amount on deposit here, showing that this fund was under the control of agents of the German Government in this country, the letter to the Reichsbank-Direktorium from the Swedish Bank stating (R. 48): "Furthermore we still miss credit advices by the National City Bank for nearly all transfers ordered by you since the beginning of the year and therefore do not know, whether a disposal of five millions will be honoured immediately." The Reichsbank in Berlin knew nothing of the status of this account except the information conveyed to it by the Swedish Centralbank.

This is shown by the testimony of Mr. Willy Seidell offered under Reichsbank stipulation (R. 46) as follows:

"Q. Will you look at the second entry under May 5, 1917, and tell us whether you made any part of that entry?

"A. Yes.

"Q. What part?

"A. The second column: 5 million. Then: value 12.6 (June 6), and in the last column with pencil: 60634 DA.

"Q. From what source did you get the information upon which you made the entries which you have just stated?

"A. I made the entries on the basis of an extract of account from the Skandinaviska Kreditaktiebolaget."

It will be noted that the Reichsbank did not even get this information from the Swedish Bank but obtained it from the Skandinaviska Kreditaktiebolaget. The latter bank absorbed the Swedish Central Bank



and became its legal successor some time later. (See appellee's exhibit No. 51—R. 59.)

The portions of the testimony of this witness omitted by appellee was set forth by appellant in continuity. (R. 83-84.)

“Q. Have you that extract of account here?

“A. Yes, it is here.

“Q. Will you point out in that account the entry from which the entry of 5 million on June 6 was made in the fourth main column of the Swedish Bank's account on the credit side of page 2407? A. April 28, National City Bank, Lee Higginson, 5 million; June 12. But I especially want to emphasize that this is a copy of the original extract of account.

“Q. What do you mean by saying that you specially want to emphasize that this is a copy? A. There were two extracts of account. The first has been mislaid and thereupon the second was submitted by the Skandinaviska Kreditaktiebolaget, which corresponds exactly with the first extract.”

Cross-examination by Mr. Stanley (attorney for Alien Property Custodian):

“Q. How soon after the first entry on the credit side of page 240 of 5 million dollars did you make the second entry of 5 million dollars? A. I suppose two or three years.

“Q. Mr. Seidel, I show you what purports to be an original letter dated April 28, 1917, to the Reichsbank Direktorium and purporting to be signed by the Sveriges Privata Centralbank by certain officials, and ask you whether or not you knew of that letter at the time you made the 5 million dollar entry, which you testified you made? A. No, I did not know anything about it.



“Q. Have you ever seen that letter? A. No, I have not seen it.

“Q. You testified that usually entries such as you made would be made from letters from the Swedish Bank. \* \* \* A. Yes, from this letter I would have made the entry.

\* \* \* \* \*

“The letter was received by the Central Office of the Reichsbank.”

(P. 39 of the record in the Equitable Trust Company Case):

“Q. Did this letter of April 28, 1917, come to the bookkeeping department at that time? A. Yes. It has come to that department for the attention of Mr. Malchow.

“Q. What would be the usual thing for Mr. Malchow to do with this letter when it reached him? A. Usually he would also have to fill out the second column on the credit side. I don't know why he has not done it.

“Q. It is true, is it, Mr. Seidel, that usually the 5 million dollar entry which you have made would have been made by Mr. Malchow from the letter of April 28, 1917, would it not? A. Yes.

“Q. I take it from your testimony, then, that instead of the usual entry of 5 million dollars being made upon the receipt of the letter of April 28, 1917, that that entry remained vacant until 1918, or 1919, when you received the original statement of account from the Swedish Bank, to which you have referred? A. Yes.

“Q. When you noticed that the entry had not been made did you consult the files of the Reichsbank before writing to the Swedish Bank for the original account statement in order to ascertain whether the usual letter had arrived? A. I looked in the files of the Foreign Exchange Department, but could not find anything because this letter had been filed in the secret archives of the Reichsbank.”



Therefore, not only did the Reichsbank have no information as to the status of the account, but they did not actually enter the same on their books until about two or three years after the transaction.

It certainly appears that in the usual course of banking business the letters and accounts would be made of record in the bank. However, they were not, as appears from the above testimony, and were not even of record in the Foreign Department but hidden in the secret archives of the Reichsbank.

It appears from the affidavit of Mr. Brundell (R. 59) that the account with the National City Bank was not a new one but had been carried disguised in this manner since April 16, 1917, "over which account a number of dollar transactions were booked." We are not told, however, what these transactions were or whether or not they related to the usual banking business.

The transaction is to be consummated by delivery in several portions and that the Reichsbank will make compensation "for any damage that could arise from this transaction." The name of Reichsbank was not mentioned. The Reichsbank writes to the Foreign Office, Political Department, Berlin, asking that the telegram making the offer for the sale of the dollars be transmitted to the Swedish Central Bank by the German Embassy in Stockholm. (R. 50-51.)

The transaction seems to have been effected several months after the out-break of the war and in direct violation of the laws of the United States dealing with trading with enemies. The equivalent of Swiss francs was not put to the account of Reichsbank because the American Government had not approved the transfer. (R. 57-58.) In September, 1917, the transaction was cancelled. In January the Swedish



Bank was informed by the Swiss Bank of the seizure by the Alien Property Custodian. (R. 56)

There is not a word of information in this whole correspondence showing the source of this fund, the uses to which it was being put to, or why it was in this country, and the whole transaction is veiled in secrecy.

There next appears in the evidence offered under appellees' stipulation an affidavit of Petrus Brundell, who is secretary of the Skandinaviska Kreditaktiebolaget of Stockholm. (R. 59.) This bank is the legal successor of the Aktiebolaget Sveriges Privata Centralbank, Stockholm. Brundell does not say that he was ever connected with the Swedish Private Central Bank or how he came into the possession of the facts which he stated in the affidavit. The most natural way of proving the facts in the affidavit would be by the production of the books and records of the Swedish Central Bank. In this way some knowledge could undoubtedly have been gained of the nature of the fund, its source or parties making the deposits, at whose instance withdrawals were being made and to whom disbursed. The account was an active one because it is admitted that "dollar transactions" had been booked over this account.

Besides the mere allegations of ownership which Brundell makes and which he is entirely unqualified to make, the affidavit contains no facts by which ownership by the Reichsbank can be established, although the records of this bank and the information of those officials of the Central Bank having charge of this account could very well throw some light on the subject. This further illustrates the nature of the evidence produced in this case and the failure on the part of the Reichsbank to produce the real and primary evidence



by which the court could intelligently pass upon this question.

After having taken what purports to be all the relative testimony of Carl Kauffman concerning the ownership by the Reichsbank of the fund, the Reichsbank has seen fit to offer under the stipulation an affidavit of this witness to the bare fact that the Reichsbank is the sole and exclusive owner of this money.

**Correspondence Between the Reich Finance Minister of Germany and the Reichsbank. (Exhibits 1-B to 15-B, Inclusive.)**

This correspondence purports to be between the Reichsbank and the German Government are mere self-serving declarations by parties in interest, made several years after the transaction, and should not have been admitted. The attorney for the Alien Property Custodian under stipulation reserved the right to object to this testimony, but did not avail himself of this right. (R. 36.) Counsel for the appellant had no such right under his stipulation. (R. 4-5.)

This correspondence took place long after the close of the war and the revolution in Germany by which the Imperial German Government came to an end. At the time this correspondence was initiated there was in operation a systematic plan to procure the release of this money. The first plan was by utilizing the Swedish Central Bank as shown by the letter from the Skandinaviska Kreditaktbolaget to the Reichsbank, dated March 10th, 1922 (R. 56-57). The enclosed letters therein referred to though not offered in evidence were apparently from the Swiss National Bank and from either Lee, Higginson and Company or the National City Bank.



“As you will see from them, the named amount has been paid on the 12th of June, 1917, by the National City Bank to Messrs. Lee, Higginson and Co., to the debet of the Centralbank and in favor of the Swiss Nationalbank. The repayment of the amount to the National Citybank ordered by the Swiss Nationalbank, has never been executed, wherefore we judge the intended reclamation should be directed over Swiss National Bank—Messrs. Lee, Higginson and Co.,—Alien Property Custodian. To judge by this correspondence, the National City Bank as well as the A. B. Sveriges Privata Centralbank (that is now ourselves) seem to stand afar from this transaction or its settlement. We would not fail to inform you in this connection that our New York friends in the case of a similar reclamation wrote us just a few days ago: ‘For your further information, we call your attention to the fact that there are persons who specialize in the prosecution of claims against the Alien Property Custodian. One such person who has been highly recommended to us is Mr. George S. Ward, of 211 Metropolitan Building, New York City. Should you care to have us do so, we will be glad to retain him on our behalf. We understand that this can be done on the basis of a contingent fee.’”

Under the Trading with the Enemy Act on March 10, 1922, Corporations of Germany were not entitled to the return of any money or property claimed by them in the custody of the Alien Property Custodian, (See Appendix U. S. Code Title 50 Paragraphs 249 to 254), and not until the Act of March 10, 1928, were such corporations of Germany entitled to the return of moneys in excess of ten thousand dollars.

This being true the evident request on the part of the Reichsbank to the Swedish Bank that the latter



bank file "the intended reclamation" becomes apparent. In other words the Swedish Bank is asked to file a claim with the Alien Property Custodian swearing under oath that it is the owner of the \$5,000,000 fund in order to get the fund and turn it over to the Reichsbank. The Swedish Bank politely declines to go this far but suggests that this might be done by the Swiss Bank. Evidently the Reichsbank was equally unsuccessful in persuading the Swiss Bank to resort to this subterfuge. Under any view of the case insofar as the participation of the Reichsbank is concerned that institution has been shown to have resorted to deception and trickery both during the war and in its subsequent endeavor to procure the release of this fund.

This being true how much weight can be attached to this series of unauthenticated letters containing mere self serving declarations over a period of five years, during which period the Reichsbank is all the while contriving to procure such release, upon which record it now seeks to establish ownership. Under the terms of the Trading with the Enemy Act and under the Peace Treaty between Germany and this country none of the money belonging to the German Government can be returned to that country and the only manner in which the fund in controversy could be released now is through the instrumentality of the Reichsbank. This correspondence is not only at variance with the finding of the Alien Property Custodian that \$2,200,000 belonged to the Imperial German Government at the time of its seizure and that of the various courts passing upon this question as already set forth but is totally inconsistent with the subsequent action of the Alien Property Custodian in denying the rights of the holders of



dollar notes to satisfy their claims against the fund in controversy and in resisting the rights of said note holders to the extent of taking the case eventually to the Supreme Court of the United States.

### **Evidence Shows a Definite Plan by Imperial German Government.**

It has heretofore been shown that the Reichsbank was entirely controlled by the Imperial Government, handled the treasury business for that Empire and made disbursements for and on behalf of the Empire. It has further been shown that on many occasions during the period of the World War but prior to our entrance therein it has been engaged in this country in the furtherance of the German Cause during the War. An examination of appellant's testimony discloses that there was a systematic plan or scheme on the part of the Empire to promote the German cause. The evidence on this point is as follows: (See testimony of Bielaski, Chief of the Bureau of Investigation, Department of Justice of the United States (R. 73-74)).

“The organization of German propaganda came about in this way: Dr. Dernberg, who was Secretary of State for the Colonies—I think that is the translation of his title—came to the United States in September, 1914, as the head of a mission of which Heinrich Albert, officially attached to the embassy as commercial attache, and Isaac Straus, Meyer Gerhard and Captain Hacker were members. They brought with them \$150,000,000 in German treasury notes, with the expectation that they would find a ready sale in this country, and that from the proceeds propaganda expenses would be met, commercial enterprises paid for, such as the shipment of goods into Germany which were desired, and munitions of war purchased.”



“Dr. Albert’s office, in addition to his propaganda work, was engaged in a very large number of commercial enterprises—the shipping of material to Germany and the purchase of steamers, the organization of companies—all that sort of thing; not exactly propaganda, and as to which there are some reasons for not making public all of the facts at this time. \* \* \*”

“Mr. Albert’s office handled, so we understand, a complete turnover of \$35,000,000. Much of that was used in the purchase of supplies and these ship ventures and things of that kind. I have some figures here, however, which will give you some ideas on the subject.

“This is a brief statement of the moneys they received:

“First, a loan, March 1, 1915, nine months, notes due January 1, 1916, \$7,100,000.

“Two years treasury bonds, due September 1, 1918, sold mainly to German insurance companies doing business in the United States about \$1,800,000.

“Third, one-year German treasury bills sold June, 1916, due March 1, 1917, and partly renewed on that date, \$3,600,000.

“Total sales of treasury bonds and bills, \$12,500,000.

“They obtained bank credits and bank loans \* \* \* (naming the various banks).”

“Total funds produced through bank loans and bank credits \$7,050,000.

“Remittances from Reichsbank, Department of Interior, War Department, and Central Purchasing Agency of Berlin, approximately \$7,000,000.

\* \* \* \* \*

“The total funds received, as above outlined, aggregate \$27,850,000.”



### Other Acts of Reichsbank Competent and Show Nature of Fund.

It appears that the Reichsbank is one of the agencies employed by the German Government in the carrying out of this plan or scheme and the Reichsbank's close association with Dr. Albert, the Z. E. G. and the Bridgeport Projectile Company has also been shown. Therefore such a plan having been shown all of the acts of the Reichsbank and the other agencies of the Empire are competent and when considered in their entirety lead inevitably to the conclusion that the fund in controversy was being used for this and no other purpose.

In 22 C. J., 764, it is said:

“System of Coordinated Action.—An attendant circumstance of highly probative value may in some cases be found in the existence of such a series or system of coordinated or correlated facts as to lead to the inference that the particular act which is under investigation must have been done as the necessary part of a general plan to obtain a definite object and that it was done by the person to whose real or supposed interest the particular act would redound. The acts or other facts constituting such attendant circumstances may be shown to indicate the existence of a systematized plan or comprehensive design, and may be shown notwithstanding the fact that the various acts cover an extended period of time.”

*Card vs. The State*, 109 Ind. 415, where a conspiracy has first been established by sufficient proof, every declaration or act of any one of the conspirators, during the pendency of the criminal enterprise, in pursuance of the original plan and with reference to the common object, is competent evidence against each of them.



*Mudsill Mining Company vs. Watrous*, 61 F. 163. In a suit to rescind the sale of the silver mine on the ground of fraud perpetrated by the defendant by "salting samples of ore", it was held competent to show that defendant had "salted" samples in prior negotiations with other persons for the sale of the same mine. The Court said (p. 179):

"Their former efforts to make the sale by resorting to fraudulent interferences with the samples taken by experts so connect themselves with the last effort to make a sale as other acts in furtherance of the same general design. It is not in such a case essential that these former acts of fraud were not contemporaneous with the transaction under inquiry."

*Cunard S. S. Co. vs. Kelley*, 115 F. 678. In a suit against the carrier for non-delivery of goods, it was shown that the vendors had stored the goods in a public warehouse subject to their orders only. Evidence was offered to show other packages, constituting a part of the same purchases, stored in the same warehouse but shipped to the plaintiff by another line, were found on delivery to have been similarly tampered with. Held, that such proof was strong and legitimate evidence to support the defendants' contention that the substitution was made by the vendors, who had the same motive and opportunity in both cases.

#### **Failure of Reichsbank to Adduce Pertinent Evidence Creates Presumption of Unfavorable Testimony.**

All of the evidence in this case shows that the money handled by the Reichsbank in this country was money for the benefit of and at the disposal of the German



Government without a shred of evidence to show that the Reichsbank has ever acted during this period in the capacity of a private banking corporation. Thirteen years after the seizure, the Reichsbank through its attorney in fact, Frank W. Mondell, claiming this money was not for the benefit of the German Government but that it was here merely as a private business venture failed to disclose any of the facts and circumstances relating to the deposits in the face of a challenge to do so made in appellant's motion to take testimony. (R. 19)

The simple inquiry presents itself on the statement of facts presented by the Reichsbank—what was the money doing here—and this query is permitted to go unanswered. Not even the books of the National City Company to show where the fund came from, whether or not it was under the control of or subject to the disposal of persons in this country, was not permitted to be adduced. Therefore, we submit that the Reichsbank having on every other occasion acted purely and simply as an agent for the German Government for the purpose of handling the moneys in payment of the obligations of that government and the furtherance of its activities, then the conclusion is inescapable that this fund was not an exception and was employed in exactly the same manner and for the same purposes. When the Reichsbank fails to show that it was not so employed under the circumstances of the case or fails to produce the pertinent evidence but relies upon mere general allegations of ownership then the rule of law creating the presumption that such evidence is detrimental to the Reichsbank attaches and that the only reason that the Reichsbank will not give this informa-



tion is that it cannot because it knows that this money was here for, on behalf of and for the benefit of the German Government. With respect to this principle of law, we need only cite the following cases:

*Kirby vs. Tallmadge*, 160 U. S. 369, 40 L. ed. 463, holding that the failure of a party to produce evidence within his power in elucidation of the subject matter in dispute raises a presumption against him.

*Fitzsimmons vs. Ogden*, 7 Cranch 2; 3 L. ed 249, the omission of a party to furnish proof which is within his power and which is essential to his argument affords a strong presumption against him.

*Runkle vs. Burnham*, 153 U. S. 216, 38 L. ed. 694. The production of weaker evidence when stronger might have been produced lays the producer open to the suspicion that the stronger evidence would have been to his prejudice.

*Crosby vs. Buchanan*, 23 Wall. 420, 23 L. ed 137. The absolute refusal of one to disclose the facts in his answer when directly called upon to do so, although the law does not compel him to be more specific, raises presumptions against him.

### **Question of Ownership Subject to Review.**

Counsels are aware of the principle of law to the effect that where the evidence is conflicting the appellate court will not disturb the finding of fact unless clearly erroneous. This rule is usually applicable to cases tried not on the record evidence but upon the testimony of witnesses in court, the basis of this principle being that the trial court has a better opportunity to test the demeanor of the witness and the credibility of their testimony. This entire case was



tried upon record evidence and no such reason for the application for the rule prevails here and we do not think it is applicable where a case is tried under evidence offered under stipulations.

The appellate court in any event always has the right to consider the evidence to test its sufficiency to support the judgment or decree. In *Moy Jik vs. U. S.*, 47 App. (D. C.) 498, Mr. Justice Van Orsdel (p. 504) said:

“The right to look into the evidence to test the sufficiency to support a judgment is always within the discretion of an appellate court.”

*Chicago, Milwaukee and St. Paul R. R. Co. vs. Clark*, 178 U. S. 353; 44 L. ed. 1099; Mr. Justice Fuller upon the question of the right to review a case at law where trial by jury had been waived said (1105 L. ed):

“Under those circumstances the question whether the judgment rendered was warranted by the facts found was open for consideration in the circuit court of appeals, and is so here, and that is sufficient for the disposition of the case. *Shipman v. Straitsville Cent. Min. Co.*, 158 U. S. 356, 39 L. ed. 1015, 15 Sup. Ct. R. 886.”

However there is comparatively little conflict of the evidence of ownership in this case other than those general conclusions or bare claim of ownership made by the officials of the Reichsbank.

We submit however that the question of ownership within the meaning of the Trading with the Enemy Act is a legal one and not a question of fact. This question depends upon a construction of ownership within the meaning of the Act and the legal signifi-



cance which attach to the relation of the parties, *i. e.*, the German Government and the Reichsbank to the fund.

Ownership is defined in Bouvier's Law Dictionary (3rd Revision), p. 2437:

"The entirety of powers of the use and disposal allowed by law."

It is obvious then that a determination of ownership within the meaning of the Trading with the Enemy Act as tested by the rights in and control over the money is ultimately a legal question and is a proper one to be determined by this court by a review of the entire record.

#### **Interest of German Government in Reichsbank.**

Our main contention is that whether or not the Reichsbank was a separate entity of the German Empire, the fund in controversy being for the use of the German Government was within the meaning of the Trading with the Enemy Act, monies for the benefit of, etc., the German Empire.

However, assuming for the purpose of argument that the money belonged to the Reichsbank, it is submitted the German Government has such an equitable interest in the Reichsbank as to constitute ownership or part ownership of money in possession within the meaning of the Act. Under the original act of 1875, 20 per cent of the net profits was required to be set aside as a reserve fund. This continued until 1909, and the Reichsbank was thereafter required to set aside a reserve fund of 10 per cent of the profits. The government has a one-half interest in this reserve



fund. (R. 157.) We do not know to what extent this reserve fund bears to the original capital, but it is reasonable to suppose that a reserve fund of 20 per cent gross profits for 34 years and a reserve fund of 10 per cent from 1909 to the date of the seizure is substantial, if not many times in excess of the original capital invested and the German Government has an equitable interest in this fund of one-half. In addition to this the government receives three-fourths of the net profits of the bond, which gives them an equitable interest in the assets of the bank. Certainly under any circumstances it cannot be said that Germany does not have an interest in the fund in controversy even though it might not be the exclusive owner. If the Court takes this view then the value of such interest could be ascertained. It is not unreasonable to suppose that interest is worth at least \$200,000 of the fund of \$5,000,000, and upon this theory of the case it is respectfully submitted that the appellant should be entitled to a decree in the amount of \$103,000 and interest against the fund in controversy.

It is therefore respectfully submitted that upon all the evidence in the case it has been established that the fund in controversy belonged to the German Government within the meaning of the Trading with the Enemy Act, and the Trial Court erred in dismissing the bill of complaint.



## II.

**THE COURT ERRED IN HOLDING THAT THE REICHSBANK WAS A PRIVATE BANKING CORPORATION.**

This point covers the sixth and eighth assignments of errors.

As previously shown, we think the finding by the court that the Reichsbank was a private German corporation necessarily caused the court to attach more significance to the fact that the Reichsbank had the apparent custody of this fund than would have been attached to such evidence had the contrary fact been found, *i. e.*, that the Reichsbank was not a private banking corporation. And therefore this finding by the court constituted one of the essential facts leading to his ultimate decision holding the money belonged to the Reichsbank and dismissing the bill of complaint. The court in its finding of fact stated as follows (R. 19):

5. The Reichsbank was, prior to January 31, 1917, and has been at all times since, a private corporation, organized and existing under and by virtue of the laws of Germany, carrying on a general banking business. The shares of stock of said bank were, prior to January 31, 1917, and at all times since have been, owned by private persons.

6. The Government of Germany has never been the owner of the Reichsbank or any part thereof, or of any of its funds, and has not, nor ever had, or claimed, any right, title or interest in the funds held by the Alien Property Custodian, from which the plaintiff seeks to recover said alleged debt by this suit.



The most pertinent section of the law of the Bank Act, 1875, by which the Reichsbank was created and the statute promulgated by the German Emperor for the government of the Reichsbank have been set forth in the previous proposition.

The history of the events leading up to the creation of the Reichsbank and subsequent development are set forth in the introduction of the Imperial Banking Laws by Dr. Koch, formerly president of the Reichsbank. The bank was really created as a result of a treaty between Prussia and the German Empire issued on May 24, 1875. The Bank of Prussia on that date was purely a government bank for the State of Prussia. By the terms of that treaty it was agreed between the two governments as follows (R. 219):

“On this date the Bank of Prussia is to be transferred, with all its rights and duties, to the Empire, according to the provisions of this treaty.

“The Empire will merge this bank into the Reichsbank (Sec. 12 of the Imperial Bank Act).

“Sec. 3. Prussia is to receive 15,000,000 marks from the Empire in compensation for the Bank of Prussia. This sum is to be defrayed by the Reichsbank, and is to be paid to Prussia on the 1st of January, 1876.

“Sec. 6. (R. 221) The Reichsbank is to pay to Prussia after the 1st of January, 1876, the annual sum of 621,910 thalers (1,865,730 marks) in semi-annual instalments on account of the obligations assumed by the Bank of Prussia in the agreement of the 28th—31st of January, 1856, with regard to the state loan of 16,598,000 thalers. The term of this obligation is to expire on the 1st of July, 1925, so that by the year 1925 only 310,955 thalers, or 932,865 marks, will be due.



(R. 222) "If the privilege of the Reichsbank shall not be renewed, and no other bank shall assume the obligations of the latter, the payments shall be made by the Empire, so that the income will flow undiminished to the Prussian State Treasury until the expiration of the time above mentioned."

"Sec. 8. The property of the Bank of Prussia is to be entered in the report (sec. 7) at its real value, which is to be appraised according to an arrangement with the Imperial Chancellor."

"Sec. 12. (R. 223) The rights and obligations of the Bank of Prussia designated in sections 21, 22, 23, and 25 of the Bank Act of the 5th of October, 1846, with regard to the investment of money of courts, churches, schools, hospitals, and other charitable institutions and public offices, as well as the amounts deposited according to those provisions, are transferred by the Bank of Prussia to the Reichsbank."

The bank act of 1875 by which the Reichsbank was created, provides:

"Sec. 25. (R. 148) The Empire is to exercise its supervision over the Reichsbank through a board of trustees (Bank-Kuratorium), consisting of the Imperial Chancellor, as chairman, and four members. One of these members is to be appointed by the Emperor, the other three by the Bundesrat."

"Sec. 29. (R. 149, 150) The accounts of the Reichsbank are to be audited by the court of accounts of the German Empire.

"The form in which the annual report is to be made out is to be prescribed by the Imperial Chancellor, whose directions are to be communicated to the court of accounts."



“Sec. 36. (R. 153) Besides the chief office of the bank, Reichsbank local main offices are to be established in the larger cities, designated by the Bundesrat. These offices are to be under the supervision of a board of at least two members and of a bank commissioner (Bank-Kommissarius) appointed by the Emperor.”

“Sec. 38. (R. 154, 155) \* \* \* The Imperial Chancellor is to determine and make special announcement under what conditions and in what form the signatures of the local bank offices are to constitute an obligation for the Reichsbank.”

“Sec. 40. (R. 155) The Statute of the Reichsbank is to be decreed by the Emperor, with the assent of the Bundesrat, according to the provisions contained in the foregoing sections 12 to 39.”

“Sec. 41. (R. 156, 157) The Empire reserves the right of option on January 1, 1891, and thereafter at the expiration of every ten-year period: (a) of discontinuing the Reichsbank established by this Act and acquiring its property on the basis of the book values, or (b) of acquiring the total stock of the Reichsbank at valuation. One year's notice is to be given, and preliminary announcement to be made, by the Imperial Chancellor to the Reichsbank board of directors. The announcement is to be issued upon the imperial decree, with the approval of the Bundesrat, and is to be published by the Reichsbank board of directors.”

From the above it will be seen that the Reichsbank was, in 1917, totally controlled and dominated by the Empire without any restrictions or limitations to its power. The only element indicative of the fact that it was a private corporation was that shares of stock of the Reichsbank are alleged to have been privately



owned. We do not know by whom, but there is an affidavit to the effect that the German Government did not own any of the stock. However, the government did receive from this bank three-quarters of the profits, and in the event of liquidation one-half of the reserve fund, as well as an option to purchase the assets of the Reichsbank outright and the right to dissolve the same and take it over at the expiration of each ten-year period. The so-called shareholders are not shareholders in the sense of corporations under the laws of this country in any sense of the word; they have no control over the management or affairs of the bank and only a limited right to the profits. The rights of the so-called shareholders are much more analogous to the rights of bondholders of corporations in this country investing capital for the use of the corporation and not having any control over the business itself and no liability in event of failure.

The point is further made that the Reichsbank engaged in a private banking business in Germany. The fact that the German Government engaged in a private enterprise was not unusual in Germany. Prior to the war the State of Prussia owned and operated mines, railroads, and other enterprises.

Her (Prussia's) total revenue, upon which she lives, like a prudent nation, without running further into debt, is only thirty-two million. One-half of this comes from her crown lands, her forests, her railways, mines, iron-works, and other industrial enterprises.

\* \* \* \* \*

Prussia has ten thousand miles of railway, nearly one-half of which are owned or administered by the state. (Mackenzie's *His. The 19th Century*, pp. 338-339.)



However, during the war the Reichsbank appears to have entirely suspended the business of private banking and engaged in no other activity save that of a governmental nature in financing the German Government during the war.

In a book written by Solomon Flint, Ph. D., College of the City of New York, entitled "The German Reichsbank and Economic Germany," it is said:

"At the outset of the Great War, Germany was confronted by two great financial problems: the problem of public credit and that of private credit. So far as private credit was concerned, the problem was to secure the uninterrupted flow of credit for industry and commerce. \* \* \* On the other hand modern wars require such tremendous amounts of capital that recourse to credit is inevitable. (p. 36)

The prevailing situation required immediate relief. It was first necessary to calm the business world about the possibility of obtaining credit in the future, and secondly to relieve the Reichsbank from the burden of private credit. Only by diverting the demand for credit by the public from the Imperial Bank to other institutions was it possible for the Reichsbank to concentrate its activities on the financial assistance of the Government. On August 4, 1914, the German Parliament passed various laws, the purpose of which was to promote these policies. (p. 39)

In order to secure undisturbed credit for industry and trade without imposing this additional task upon the Reichsbank, the Reichstag passed a law providing for the establishment of the German war banks (Darlehnskassen). It was the task of these banks to divert the demand for credit from the Reichsbank. (p. 41) These provisions altered materially the fundamental principles of central banking which were imposed in the bank act of



1875. The Reichsbank was no longer the German Central Bank with the duty 'to regulate the circulation of money within the Reich and to facilitate the settlement of payments.' Instead it became now an institution entrusted with the task of providing financial assistance to the Government in its war policies. One must, however, be very cautious not to regard such an action as extraordinary; the great war imposed such tremendous financial burdens upon the belligerent nations that most of them could not resist the temptation to create artificial purchasing power through considerable loans from their respective banks. It was an inevitable step if the various governments wished to obtain the necessary funds. Moreover, one should not forget that the Chancellor of the Empire was the President of the Reichsbank so that this particular institution would have to carry out (p. 42) his instructions."

It is therefore respectfully submitted that the court erred in finding that the Reichsbank was a private banking corporation.

### III.

#### **THE COURT ERRED IN ADMITTING IN EVIDENCE THE AFFIDAVIT AND CERTIFICATE OFFERED BY COUNSEL FOR THE REICHSBANK WHICH WAS NOT INCLUDED IN THE EVIDENCE OFFERED UNDER THE STIPULATIONS.**

This proposition covers the following assignments of error:

12. The court erred in admitting over the objection of the plaintiff Thompson, evidence offered by the Reichsbank which was not included in the stipulations.



13. For error in admitting said evidence in that the same was ex parte, hearsay and not properly authenticated.

This refers to the affidavits of Dr. Wilhelm Vocke and a statement issued by M. Schaub, an officer of the German ministry of finance. (R. 70-71-72) It does not appear what position Mr. Schaub occupied in the German ministry of finance. Neither the statement or the affidavit were offered under the stipulation, and if the trial court was correct in his memorandum opinion that "I have no right to compel either side to modify that stipulation," then clearly it was erroneous to have admitted this other evidence contrary to the terms of the stipulation, providing that the evidence included therein should constitute the entire evidence in the case.

Neither does it require extended argument to submit the proposition that this evidence was clearly inadmissible as being merely ex parte and should not have been admitted by the lower Court.

In *Von Zedtwitz v. Sutherland*, 58 App. D. C. 153, 26 F. (2d) 525, it was held that a certificate of the German Foreign Office to the effect that appellant had forfeited German citizenship was merely a narrative of a past event, therefore hearsay.

It is therefore respectfully submitted that the court erred in admitting this evidence over the objection of appellant.



## IV.

**UNDER ALL THE FACTS AND CIRCUMSTANCES  
THE COURT ERRED IN REFUSING TO GRANT  
THE APPELLANT'S MOTION TO TAKE TES-  
TIMONY.**

This proposition includes the following assignments of error:

14. The court erred in denying the plaintiff, Thompson's, amended motion to take testimony.

15. For error in denying said motion in that said stipulation had already been vacated by the offer on the part of Reichsbank and by the admission of the court over objection of the plaintiff, Thompson, of evidence other than that included in the stipulations.

16. For error in denying said motion in that it was apparent from the evidence offered under the stipulations that all of the evidence bearing on the ownership of said fund and the issues presented in the case was not before the court and that other material evidence was readily available.

18. In that it appeared from said motion that the Reichsbank and the Alien Property Custodian had omitted from the evidence offered under said stipulations vital and material evidence bearing upon the ownership of said fund and the issues in controversy which said evidence omitted tended to show that said fund in controversy was property subject to the debts of the German Government.

We submit that the evidence conclusively establishes ownership of the fund in controversy in the German government as maintained in our first proposition. If, however, this Court should have any doubt upon the subject, then certainly the motion to take testimony



should have been granted in order that the facts which the defendants below have withheld should be produced in the trial of this case.

In the two stipulations between the Alien Property Custodian and the Reichsbank there was no restriction or limitation that the evidence offered thereunder should comprise the entire evidence in the case, in fact after the first stipulation was entered into offering certain evidence the Alien Property Custodian entered into another stipulation offering further evidence, the only prohibition against offering further evidence appears in the stipulation between Mr. Edmund Burke, now deceased, and the attorney for the Alien Property Custodian. The present counsel were not attorneys for appellant at the time the stipulation was entered into, and present counsel do not know why the former counsel, now deceased, agreed to try the case on the evidence offered under appellees, stipulation, unless the same was done through inadvertence or that he thought this was the only means by which the Alien Property Custodian could be prevented from paying the money to the Reichsbank. Be that as it may, the evidence offered under the motion to take testimony was not in the possession of counsel until long after the order of consolidation, and in fact present counsel did not get into this case until long after the order and shortly thereafter procured the evidence submitted under the motion to take testimony. We think it not improbable that had Judge Burke this evidence he would not have agreed to its exclusion by stipulation.

#### **Stipulation Vacated for Mistake, or Inadvertence.**

The original stipulation provided that said excerpts contained all of the testimony given by Mr. Kauffmann,



Mr. Seidel, and Mr. Reep relating to the ownership of the money which is the subject-matter of this suit and the status of the Reichsbank. Evidently Judge Burke, relying upon the statements contained in the stipulation, was misled into believing that all of the pertinent evidence in that case was before the court. However, as has been shown, this was not the fact and much material testimony offered in the Equitable Trust Co. case relating to the ownership of the fund and to the status of the Reichsbank was omitted from the evidence offered under the stipulation. To say the least, this is a proper ground for vacating the stipulation on the ground of mistake.

*“Mistake.* By analogy to rules elsewhere stated, courts may set aside stipulations where a mistake of fact is clearly shown, upon such terms as will meet the justice of the particular case.” 60 C. J. 96-97.

*“False statements innocently made.* A stipulation as to the existence of certain facts, or for the dismissal of a case on the merits, may be set aside, where it was induced by false representation as to material facts, the falsity of which was unknown to the person making them, although there was no fraud or wrongful intent to defraud or deceive.” 60 C. J. 97.

*“Inadvertence or Improvidence.* Even in the absence of the grounds for setting aside stipulations heretofore enumerated, it has very generally been held that the courts, by reason of the large equitable powers which they have over their own proceedings, and the discretion vested in them, may relieve against stipulations inadvertently, inadvisedly, or improvidently entered into which will operate inequitably and to the prejudice of one of the parties provided all the parties may



be placed in the same condition as before the stipulation was made; but due regard must be had to the rights of the adverse party so that he be not misled and allowed to act to his injury in reliance thereon." 60 C. J. 97-98.

Under any view of the case, it is submitted where there is so much material evidence in the case which had not been included under appellee's stipulations as to demand in the interest of justice that all of the facts be heard, the court should have granted the motion to take further testimony, especially so since the appellees purported to include in these stipulations all of the pertinent evidence in the Equitable Trust Co. case. The courts have repeatedly held that the counsel have no power to stipulate as to facts which did not exist, or to require the court to try a case on a hypothetical state of facts. In 60 C. J. 63, it is said:

"The court will strive to avoid a construction which would make the stipulation deceptive or misleading, and will seek an interpretation which is consonant with good faith and honest purpose on the part of the attorneys; and a construction will not be adopted which will permit of its being used as a trap to the disadvantage of one of the parties.

In *Landic v. Simms*, 1 D. C. App. 507, a case on an agreed statement of facts, the court said: (512)

"We will not hold the parties bound under the circumstances of this case to the strict letter of this "agreed case."

In *Swift & Co. v. Hocking Valley R. Co.*, 243 U. S. 281, 61 L. Ed. 722, Mr. Justice Brandeis, page 725 of 61 L. Ed., said:



“If the stipulation is to be treated as an attempt to agree “for the purpose only of reviewing the judgment” below, that what are the facts shall be assumed not to be facts, a moot or fictitious case is presented. “The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or property, which are actually controverted in the particular case before it. \* \* \* No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.” (Authorities.) We treat the stipulation, therefore, as a nullity.

### **Stipulation May be Vacated to Prevent Injustice.**

A court of equity in the exercise of its broad power of doing justice irrespective of the technical requirements has the power to set aside stipulations where the same would result in a miscarriage of justice.

In *Harvey v. Thorpe*, 28 Ala. 250, the court set aside a stipulation admitting certain errors through mistake. The court, at page 261, said:

“Conceding, so far as the present case is concerned, that attorneys may bind their clients by mere admissions as were here made, it is only necessary to observe, that if they are made inadvertently and by mistake, the court by means of its coercive powers over its own officers has authority to relieve against the consequences of the admission; regulating its action in this respect with a just regard to the rights of both parties, which it can do by setting aside the agreement upon terms which will meet the justice of the particular case. 1 Green. Ev. Sec. 206. The evidence submitted to the court brought the question within the principle we have laid down; and the authority to the extent it was exercised was judicious.”



In *Welsh v. Noyes*, 14 P. 317; 10 Colo. 133, the court upon the question of setting aside a stipulation said, at page 333, 14 Pac.:

“In a stipulation by counsel for convenience or expedition in the trial of the case, if counsel, inadvertently or otherwise admit or state a fact not in accord with the premises, entirely against the manifest purpose of the parties, and the nature of the controversy, and to the irreparable injury of the client they represent, as this seems to be, the court wherein such cause is pending has power and rightfully exercises it to relieve the party from such stipulation.”

In *Ward v. Clay*, 23 Pac. 50; 82 Cal. 502, the court said:

“There can be no doubt of the power of a trial court to relieve the party of the effect of a stipulation which admits as a fact that which is not true, if the application is made in proper time. The principal purpose of vesting the court with this discretionary power is to enable it to mould and direct its proceedings so as to dispose of cases upon their substantial merits.”

### **Stipulation Broken by Reichsbank.**

In any event the stipulations have been directly violated by the attorney for the Reichsbank in offering testimony not under the stipulation. This being true, the stipulation had in fact been broken and the appellant had a right to offer further testimony.

In 60 C. J., page 90, it is said:

“A stipulation may be abrogated, waived, or abandoned by acts of both parties, or one of the parties may waive the benefit thereof by his acts, as where he takes some step in conflict with the provisions of the agreement.”



It might be contended that the admission by the court of the evidence offered under the stipulation cured the error in failing to grant the motion. This, however, is not true. The record on its face shows that the evidence of ownership by the Reichsbank is incomplete and inconclusive. There is much pertinent evidence bearing on this question which could not be set out in this motion because it could not be secured except under subpoena. For example, the records of the National City Co., the Swedish National Bank, the Swiss National, the records of Lee Higginson Co., Kuhn, Loeb & Co., and the Reichsbank itself, all of which evidence is material for a determination of the question of ownership of the fund in controversy.

It is therefore respectfully submitted that the court under the facts and circumstances in this case erred in refusing to grant plaintiff's motion to take testimony.

## V.

**EVEN THOUGH IT SHOULD BE FOUND THAT THE MONEY IN CONTROVERSY BELONGS TO THE REICHSBANK THE COURT ERRED IN DISMISSING APPELLANT'S BILL OF COMPLAINT BECAUSE SAID FINDING DOES NOT PRECLUDE APPELLANT FROM SATISFYING ITS CLAIM AGAINST OTHER MONIES OF THE IMPERIAL GERMAN GOVERNMENT IN THE HANDS OF THE ALIEN PROPERTY CUSTODIAN.**

This covers the first assignment of error.

The Alien Property Custodian while denying in his answer to appellant's bill that the fund in controversy belongs to the Imperial German Government (para-



graph 9 of answer, R. 10) does not deny that it has in his hands funds of the Imperial German Government, nor has he offered any evidence of this fact. Until that fact was established the bill should not have been dismissed. Appellant in the first place has been denied the opportunity of establishing its claim against the German Government and its bill has been dismissed even though there might be monies of the Imperial German Government in the hands of the Alien Property Custodian to satisfy his claim or a part thereof. The order of consolidation was a limited one merely "for the purpose of the determining whether or not the Reichsbank is the owner of the funds held by the Alien Property Custodian and/or the Treasurer of the United States in Trust No. 9322 in the name of 'Undisclosed Enemy No. 1' and for this purpose only." (See Order for consolidation, R. 7) It will therefore be seen that this order is merely interlocutory and was not for the purpose of finally determining the appellant's case.

Section 9 of the Trading with the Enemy Act provides that "any person not an enemy \* \* \* to whom any debt may be owing from an enemy whose property or any part thereof shall have been conveyed, transferred etc., \* \* \* to the Alien Property Custodian may file with said custodian a notice of his claim under oath \* \* \* and the President, if application is made therefor by the claimant, may order the payment \* \* \* to said claimant of the money or other property so held by the Alien Property Custodian \* \* \* said claimant may institute a suit in equity in the Supreme Court of the District of Columbia \* \* \* to establish the \* \* \* debt so claimed, and if so established the Court shall order payment \* \* \* to said claimant of the money or



other property so held by the Alien Property Custodian \* \* \* ”

From the above it appears that the claimant must first establish his debt and if so established the Court may then order payment from any money or property of the enemy in the hands of the Alien Property Custodian. This being true it is submitted the Court erred in dismissing appellant's bill upon deciding that the \$5,000,000 fund did not belong to the Imperial German Government.

For the foregoing reasons counsel for the appellants ask that the decree be reversed.

Respectfully submitted,

L. Q. C. LAMAR.

AUBREY B. FENNELL,

*Attorneys for Appellant.*







FOR MR. JUSTICE ROSS

COURT OF APPEALS  
DISTRICT OF COLUMBIA  
FILED

OCT 28 1933

*Tracy H. Dodge*

No. 5810

CLERK

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## In the Court of Appeals of the District of Columbia

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NORTHERN TRUST COMPANY, A BODY CORPORATE,  
ADMINISTRATOR OF THE ESTATE OF ROBERT J.  
THOMPSON, DECEASED, APPELLANT

v.

UREY WOODSON, AS ALIEN PROPERTY CUSTODIAN;  
W. A. JULIAN, AS TREASURER OF THE UNITED  
STATES, AND REICHSBANK, APPELLEES

---

### BRIEF FOR APPELLEES

ANGUS D. MacLEAN,  
*Assistant Solicitor General,*

H. B. COX,  
*Special Assistant to the Attorney General,  
Attorneys for Appellees.*

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# INDEX

|                                                                                                                                                                                                        | Page |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| Statement of Case.....                                                                                                                                                                                 | 1    |
| Propositions of Law.....                                                                                                                                                                               | 23   |
| Argument.....                                                                                                                                                                                          | 23   |
| I. The Book or Pamphlet entitled "German Imperial<br>Banking Laws" is not in evidence in this case and<br>should not be considered.....                                                                | 23   |
| II. The Findings of the Court should not be disturbed....                                                                                                                                              | 27   |
| III. The evidence clearly establishes that the funds in con-<br>troversy never belonged to the German Govern-<br>ment.....                                                                             | 29   |
| IV. The appellant's contention that the Court erred in<br>refusing to grant his motion to take further testi-<br>mony.....                                                                             | 95   |
| V. The Appellant is precluded in this suit from satisfying<br>his claim against any monies which may be in the<br>hands of the Alien Property Custodian to the credit<br>of the German Government..... | 97   |
| Conclusion.....                                                                                                                                                                                        | 98   |

## CITATIONS

### Cases:

|                                                                                          |               |
|------------------------------------------------------------------------------------------|---------------|
| <i>Bank of United States v. Planters Bank of Ga.</i> , 9 Wheat. 903.....                 | 87,<br>89, 90 |
| <i>Bank of Ky. v. Wistar</i> , 3 Pet. 431.....                                           | 89            |
| <i>Beall v. Plugg</i> , 57 App.D.C. 69.....                                              | 27            |
| <i>Behn, Meyer &amp; Co., Ltd., v. Miller</i> , 266 U.S. 457.....                        | 85            |
| <i>Briscoe et al. v. Bank of Commonwealth of Ky.</i> , 11 Pet. 257....                   | 89, 90        |
| <i>Castleman v. Arignone</i> , 56 App.D.C. 253.....                                      | 27            |
| <i>Curran v. Arkansas et al.</i> , 15 Howard 304.....                                    | 88            |
| <i>Darrington et al. v. Bank of Ala.</i> , 13 How. 12.....                               | 89            |
| <i>Dartmouth College v. Woodward</i> , 4 Wheat. 518, 669.....                            | 86            |
| <i>Harding v. Hart</i> , 113 Fed. 304.....                                               | 28            |
| <i>Hopp v. Calloway</i> , 52 App.D.C. 3.....                                             | 27            |
| <i>Louisville, Cin., Charleston R. Co. v. Letson</i> , 2 How. 495....                    | 90            |
| <i>Manning v. American Security &amp; Trust Co.</i> , 50 App.D.C.<br>194.....            | 27            |
| <i>Pope v. United States Shipping Board, etc.</i> , 269 Fed. 319....                     | 92            |
| <i>Providence Eng. Corp. v. Downey Ship Building Corp.</i> , 294<br>Fed. 641.....        | 91            |
| <i>Ricketts v. United States</i> , 59 App.D.C. 47.....                                   | 28            |
| <i>Sloan Shipyards Corp. v. United States</i> , 258 U.S. 549.....                        | 93            |
| <i>United States v. Matthews</i> , 282 Fed. 266.....                                     | 92            |
| <i>United States v. Securities Corp. General</i> , 55 App.D.C. 256;<br>269 U.S. 283..... | 30            |
| <i>United States v. Strang</i> , 254 U.S. 491.....                                       | 93            |
| <i>Vanderbilt v. Bishop</i> , 199 Fed. 420.....                                          | 28            |
| <i>White v. Mechanics Securities Corp.</i> , 55 App.D.C. 261; 269<br>U.S. 283.....       | 30, 31        |



# In the Court of Appeals of the District of Columbia

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No. 5810

---

NORTHERN TRUST COMPANY, A BODY CORPORATE,  
Administrator of the Estate of Robert J. Thompson,  
Deceased, appellant

v.

UREY WOODSON, AS ALIEN PROPERTY CUSTODIAN;  
W. A. Julian, as Treasurer of the United States;  
and Reichsbank, appellees

---

## BRIEF FOR APPELLEES

---

### STATEMENT OF CASE

This is an appeal from the final decree of the Supreme Court of the District of Columbia, holding an Equity Court, dismissing the appellant's Bill of Complaint.

(a) *Nature of Action.*—The suit is brought under the provisions of section 9 of the Trading with the Enemy Act to establish a debt of \$103,000.00 and interest against the Imperial German Government and to collect such debt from specific funds belonging to the Reichsbank, in the custody of the Alien Property Custodian.



(b) *The Plaintiffs*.—The suit was originally brought by Robert J. Thompson as the owner of notes of the Imperial German Government. Mr. Thompson has since died, and on March 2, 1932, the Northern Trust Company, Administrator of his Estate, was duly substituted as party plaintiff (R. 16).

(c) *The Defendants*.—The suit was instituted, not only against the Alien Property Custodian and the Treasurer of the United States, as the custodians of the specific funds from which plaintiff seeks to be paid his alleged debt against the Imperial German Government, *but also against the Reichsbank as a joint defendant* and for whom and in whose name, the specific funds are held by the other defendants, but which plaintiff contends are in fact funds of the Imperial German Government. The Reichsbank was never served and no appearance was made for it (R. 98). (Since this appeal was perfected Howard Sutherland, formerly Alien Property Custodian, and W. O. Woods, formerly Treasurer of the United States, have vacated their offices. Urey Woodson has been substituted for Howard Sutherland, as Alien Property Custodian, and W. A. Julian has been substituted for W. O. Woods, as Treasurer of the United States.)

(d) *The Complaint*.—The material allegations of the Complaint are that, prior to the declaration of war by the United States against Germany, Thompson purchased bonds of the Imperial German Government to the amount of \$103,000.00; that such bonds were owing to and owned by plaintiff on



October 5, 1917 and are still owing to and owned by him; and that said bonds and the interest thereon are due and unpaid.

It is further alleged that the defendant Reichsbank was a part of the Government of Germany and that although it claims to be a private corporation, it was not a private corporation on April 28, 1917, or operating as such, but was the agent of Germany in the interest of Germany and alien enemies of the United States and its allies in the then pending war.

It is further alleged that the defendant Reichsbank has filed a claim with the Custodian demanding the return to it as its property of approximately \$5,077,000.00; that said property is not the property of the Reichsbank and is the property of Germany and subject to the debts of Germany to American creditors; that this property was seized by the Alien Property Custodian on March 8, 1918; that, on April 28, 1917, a part of the \$5,077,000.00 was the property of Germany and the balance was the property of the Reichsbank; that, on April 28, 1917, the Reichsbank and Germany joined their respective portions in a common fund and transferred this fund to the United States to be used for the benefit of Germany and to the prejudice of the United States and its allies; and that this fund of \$5,077,000.00 inured to the benefit of American creditors of Germany.

Plaintiffs pray for the establishment "of the said debt and the payment of the same from *said* monies" and that the Reichsbank be enjoined from asserting



any right, etc., "in or to said monies or any part thereof" (R. 1-4).

(e) *The Answer*.—On October 24, 1930, the Alien Property Custodian and the Treasurer of the United States filed their Answer. Paragraphs I to VI thereof were in the nature of a Motion to Dismiss the Bill.

As to the alleged debt of \$103,000.00 the defendants demanded strict proof.

As to the allegations that the fund of \$5,077,000.00 belonged to the German Government, the defendants denied the same and specifically alleged that it belonged to the Reichsbank, a private corporation, and that said bank was not the agent of or controlled by the German Government. The Answer admitted that there was then pending before the Alien Property Custodian the claim of the Reichsbank for the said monies (R. 8-11).

(f) *The Motion for Consolidation*.—On October 14, 1930, plaintiffs (appellants here) filed a Motion that this suit (Equity No. 51612) be consolidated with Equity No. 51537, same being entitled "*Reichsbank by its Direktorium v. Howard Sutherland as Alien Property Custodian, and W. O. Woods as Treasurer of the United States*" (R. 4-5).

(g) *The Stipulation of October 24, 1930*.—The Amended Bill of Complaint was filed on October 13, 1930 and, as above stated, the Motion to Consolidate with Equity No. 51537 was filed on October 14, 1930 and the Answer of the Alien Property



Custodian and the Treasurer of the United States was filed on *October 24, 1930*.

On the same day on which the Answer was filed, to wit, October 24, 1930, the plaintiff and the defendants, the Alien Property Custodian and the Treasurer of the United States, by their respective counsel entered into a Stipulation (R. 5-6). So far as here material, the Stipulation provided:

1. That the evidence stipulated by counsel for the respective parties in the cause of *Reichsbank v. Sutherland et al.*, Equity No. 51537, be considered by the Court as the *evidence of the plaintiff in this cause*.

2. That said evidence, consisting of said stipulations and the exhibits attached thereto, *is the only evidence which will be introduced in this cause with respect to the ownership of funds in the hands of the Alien Property Custodian and/or the Treasurer of the United States out of which this plaintiff seeks to recover his alleged debt against the German Government.* (Italics ours.)

(h) *Equity No. 51537*.—It will be noted, then, that the ownership of the fund of \$5,077,000.00 was, by this Stipulation, to be determined in the instant case solely from the evidence as to ownership in Equity No. 51537.

The Bill of Complaint in Equity No. 51537 was filed on June 11, 1930 (R. 26), and the Answer was filed on June 25, 1930 (R. 29); the case being entitled *Reichsbank, a Corporation, by the Reichsbank Direktorium, Plaintiff, v. Howard Sutherland, as*



*Alien Property Custodian, and Walter O. Woods, as Treasurer of the United States, Defendants.*

So far as here material, it was alleged in the Complaint (R. 26) and admitted in the Answer (R. 29) that the Reichsbank is and was since prior to April 6, 1917, "a private corporation organized and existing under and by virtue of the laws of Germany, carrying on a general banking business." It was further alleged (R. 27) that in 1917 or 1918, the Alien Property Custodian, purporting to act under the Trading with the Enemy Act, seized a sum of approximately \$5,120,000.00 then in the hands of certain banking concerns; that the Alien Property Custodian deposited in the United States Treasury to the credit of "Trust No. 9322, Undisclosed Enemy No. 1" approximately \$5,077,900.00 and that he so deposited the balance to the credit of "Trust No. 465, Reichsbank Direktorium". As to these allegations, the Answer alleged (R. 30) that the Alien Property Custodian had seized \$5,075,951.78 in the hands of one of the banking concerns named and that he had deposited it in Trust No. 9322 in the name of "Undisclosed Enemy No. 1"; that he had seized \$41,151.87 in the hands of another of the banking concerns named and had deposited it in Trust No. 465 in the name of the Reichsbank Direktorium. It was then alleged (R. 27) that all of this money was the property of the Reichsbank and as to this allegation defendants demanded strict proof (R. 31). It was further alleged (R. 27) and admitted (R. 31) that no one other than plaintiff asserted any claim.



of ownership to this property. It was then alleged (R. 27-28) that this sum of \$5,120,000.00 less \$2,200,000.00 which had been paid from Trust No. 9322 "by and with the consent of the Reichsbank Direktorium" and \$10,000.00 returned to the Reichsbank, was still held by the Alien Property Custodian and these allegations were admitted in the Answer (R. 31). Finally, it was alleged (R. 28) that the Reichsbank, by its attorney, had filed a claim with the Alien Property Custodian for all of the money seized less \$2,200,000.00 theretofore paid out by the Alien Property Custodian "by and with the consent of said plaintiff" but that no part of the same except, the sum of \$10,000.00, had been released to plaintiff; these allegations were admitted in the Answer (R. 28).

It is apparent that the vital question in Equity No. 51537 was whether or not the Reichsbank, a private corporation, was the owner of these funds. The allegations were clear and specific and there could be no possible question of doubt as to the character and nature of the suit.

(i) *The Order of Consolidation.*—It will be recalled that the parties had filed their Stipulation on October 24, 1930. On that same day, plaintiff moved the court for such consolidation and, after hearing arguments of counsel on both sides, the court made and entered an Order for Consolidation, which, so far as here material, provided (R. 6-7):

1. That the above entitled cause be and the same hereby is consolidated with the cause of *Reichsbank v. Sutherland et al.*, Equity No.



51537, for the purpose of the determination of whether or not the Reichsbank is the owner of the funds held by the Alien Property Custodian and/or the Treasurer of the United States in Trust No. 9322 in the name of "Undisclosed Enemy No. 1", and for this purpose only, *upon the evidence now stipulated in the above entitled case, and that evidence only, which is the same evidence as that now stipulated in the cause of Reichsbank v. Sutherland et al., Equity No. 51537.*

\* \* \* \* \*

3. That the question of whether or not the Reichsbank is the owner of the funds held by the Alien Property Custodian and/or the Treasurer of the United States in Trust No. 9322 in the name of "Undisclosed Enemy No. 1" be determined by this Court upon a motion of the Reichsbank in the cause of *Reichsbank v. Sutherland et al., Equity No. 51537*, for a decree on the pleadings, stipulation and exhibits attached thereto, and upon the amended bill of complaint, answer and stipulation in the instant cause. (Italics ours.)

It will be noted, then, that the Motion for Consolidation was made by plaintiff in this cause (R. 4-5) and that the Order for Consolidation was made after the hearing on said Motion and arguments thereon (R. 6). It will be further noted that the consolidation was for the purpose of determining whether or not the Reichsbank was the owner of the funds and that such determination would be made by the Court "upon the evidence now stipulated in the



above entitled cause, and that evidence only, which is the same as that now stipulated in" Equity No. 51537.

(j) *Status of Equity No. 51537 at the Time of Stipulation and Order for Consolidation.*—It will be recalled that the Bill of Complaint in Equity No. 51537 was filed on *June 11, 1930* (R. 26) and that the Answer in that cause was filed on *June 25, 1930* (R. 29).

On *June 26, 1930*, a Stipulation was filed in Equity No. 51537. (R. 32.) It was therein agreed that the testimony, as to ownership of these funds, of certain witnesses in the case of *The Equitable Trust Company, New York, Complainant, v. Thomas W. Miller, as Alien Property Custodian of the United States, Frank White, as Treasurer of the United States, and the Reichsbank, defendants in the United States District Court for the Southern District of New York*, would be received as their testimony in Equity No. 51537, such testimony being attached to the Stipulation as Exhibit 1. It was further agreed that certain letters passing between the Reichsbank and other European banks and the National City Bank of New York would also be received in evidence in Equity No. 51537, such letters being attached to the Stipulation as Exhibits 2 to 20. It was further agreed that certain affidavits would be received in Equity No. 51537 as the testimony of the makers thereof, such affidavits being attached to the Stipulation as Exhibits 22, 23, 24, and 25, respectively.



All of this testimony, letters and affidavits were for the purpose of proving the ownership of the funds (R. 42-62).

On *October 3, 1930*, a further Stipulation was filed in Equity No. 51537 (R. 35-36). By this Stipulation, certain letters passing between the Reichsbank and the Minister of Finance of Germany were stipulated, such letters being attached to the Stipulation as Exhibits 1 (b) to 15 (b). These letters were for the purpose of proving the circumstances under which the Reichsbank had agreed to the disbursement of \$2,200,000.00 from the fund of \$5,000,000.00 by the Alien Property Custodian (R. 62-70).

(k) *Status of both Equity No. 51537 and this Cause at Time of Consolidation.*—To summarize, then, the status of the two cases at the time of the consolidation was as follows:

1. The Bill of Complaint in Equity No. 51537 had been filed on *June 11, 1930* (R. 26), and the issues were joined in that cause on *June 25, 1930*, the date the Answer was filed (R. 29).

2. In the Bill of Complaint in Equity No. 51537, it was specifically alleged that the Reichsbank was "*a private corporation organized and existing under and by virtue of the laws of Germany, carrying on a general banking business*" (R. 26) and such allegation was specifically admitted in the Answer (R. 29).

3. The claim in Equity No. 51537 was that the funds which were in Trust No. 9322 in the name of "*Undisclosed Enemy No. 1*" as well as the funds which were in Trust No. 465 in the name of "*Reichs-*



bank Direktorium" were funds belonging to the Reichsbank, a private corporation.

4. The evidence as to such claim in Equity No. 51537 was contained in a Stipulation of the parties filed on *June 26, 1930* (R. 32-35; R. 43-62), and a further Stipulation of the parties filed on *October 3, 1930* (R. 35-36; R. 62-70).

5. The Amended Bill of Complaint in this cause (Equity No. 51612) was filed on *October 13, 1930* (R. 1), and the issues were joined in this cause on *October 24, 1930*, the date the Answer was filed (R. 8).

6. In the Bill of Complaint in this cause it was specifically alleged that the Reichsbank was not a private corporation or acting as such in the matters alleged in the Bill, but that it was a part or agent of the German Government and that the funds were, therefore, funds not of a German private corporation but funds of the German Government (R. 2-3) and these allegations were not only denied in the Answer but it was specifically alleged in the Answer that the Reichsbank was a private corporation organized and existing under and by virtue of the laws of Germany, carrying on a general banking business.

7. On *October 14, 1930*, plaintiff in this case filed a *Motion to Consolidate* this case with Equity No. 51,537 under Law Rule No. 43 and gave notice to counsel for defendants that he would bring the motion on for hearing on *October 17, 1930* (R. 4-5).

8. The Bill in Equity No. 51537 having been filed on *June 11, 1930* (R. 26) and the Answer thereto having



been filed on *June 25, 1930* (R. 29) and the Stipulation in Equity No. 51537 having been filed on *June 26, 1930* (R. 32) and the further Stipulation in Equity No. 51537 having been filed on *October 3, 1930* (R. 35), plaintiff in this case was fully apprised of the issues and of the evidence in Equity No. 51537 when on *October 13, 1930*, he filed his Amended Bill of Complaint (R. 1) and when the Answer thereto was filed on *October 24, 1930* (R. 8) and when he filed his Motion for Consolidation on *October 14, 1930* (R. 4) and when he proposed to argue and submit his Motion on *October 17, 1930* (R. 5) and when he successfully secured an Order for Consolidation on *October 24, 1930* (R. 6).

(1) *The Submission of Equity Number 51,537.*—It will be recalled that under paragraph 3 of the Order for Consolidation (R. 7) it was specifically provided that the question in the instant cause, of whether or not the Reichsbank was the owner of the funds was to be determined by the Court “upon a motion of the Reichsbank” in Equity No. 51537 “for a decree on the pleadings, stipulation and exhibits attached thereto” and also “upon the amended bill of complaint, answer and stipulation in the instant cause.”

All parties in both cases being agreed, counsel for plaintiff in Equity No. 51537 filed on *October 28, 1930* a Motion for a decree in said cause “upon the bill of complaint, answer, stipulations and exhibits filed” (R. 36) having given notice to counsel for defend-



ants on *October 27, 1930* that the motion would be brought on for hearing on *October 31, 1930* (R. 37).

When this Motion for decree in Equity No. 51,537 was so brought on for hearing, counsel for plaintiffs therein sought, and without objection from counsel for defendants, were granted, leave to file in further support of the Bill a statement of two directors of the Reichsbank (R. 71) and a statement of the German Minister of Finance (R. 72) that the German Government did not then have and never had any ownership in the funds in Trusts Nos. 465 and 9322. At that time, counsel for plaintiff in the instant cause interjected himself into the proceedings being had on the Motion for a Decree in Equity No. 51,537 and orally interposed an objection to the reception and admission in evidence in said cause of these statements. The Court overruled the objection (R. 72).

(m) *Submission of the Instant Cause.*—The instant cause was argued and was finally submitted to the Court on April 1, 1931 (R. 15). The argument and submission were pursuant to the Order for Consolidation which had been made on October 24, 1930, pursuant to and in approval of the Stipulation of the parties of the same date.

(n) *Plaintiff's Motion for Leave to Take Testimony on Behalf of Plaintiff.*—After the submission of the instant cause and while it was pending determination by the Court, counsel for plaintiff filed a motion and then an amended motion on May 8, 1931, for leave to take testimony on behalf of plaintiff (R. 13-14).



been filed on *June 25, 1930* (R. 29) and the Stipulation in Equity No. 51537 having been filed on *June 26, 1930* (R. 32) and the further Stipulation in Equity No. 51537 having been filed on *October 3, 1930* (R. 35), plaintiff in this case was fully apprised of the issues and of the evidence in Equity No. 51537 when on *October 13, 1930*, he filed his Amended Bill of Complaint (R. 1) and when the Answer thereto was filed on *October 24, 1930* (R. 8) and when he filed his Motion for Consolidation on *October 14, 1930* (R. 4) and when he proposed to argue and submit his Motion on *October 17, 1930* (R. 5) and when he successfully secured an Order for Consolidation on *October 24, 1930* (R. 6).

(1) *The Submission of Equity Number 51,537.*—It will be recalled that under paragraph 3 of the Order for Consolidation (R. 7) it was specifically provided that the question in the instant cause, of whether or not the Reichsbank was the owner of the funds was to be determined by the Court “upon a motion of the Reichsbank” in Equity No. 51537 “for a decree on the pleadings, stipulation and exhibits attached thereto” and also “upon the amended bill of complaint, answer and stipulation in the instant cause.”

All parties in both cases being agreed, counsel for plaintiff in Equity No. 51537 filed on *October 28, 1930* a Motion for a decree in said cause “upon the bill of complaint, answer, stipulations and exhibits filed” (R. 36) having given notice to counsel for defend-



ants on *October 27, 1930* that the motion would be brought on for hearing on *October 31, 1930* (R. 37).

When this Motion for decree in Equity No. 51,537 was so brought on for hearing, counsel for plaintiffs therein sought, and without objection from counsel for defendants, were granted, leave to file in further support of the Bill a statement of two directors of the Reichsbank (R. 71) and a statement of the German Minister of Finance (R. 72) that the German Government did not then have and never had any ownership in the funds in Trusts Nos. 465 and 9322. At that time, counsel for plaintiff in the instant cause interjected himself into the proceedings being had on the Motion for a Decree in Equity No. 51,537 and orally interposed an objection to the reception and admission in evidence in said cause of these statements. The Court overruled the objection (R. 72).

(m) *Submission of the Instant Cause.*—The instant cause was argued and was finally submitted to the Court on April 1, 1931 (R. 15). The argument and submission were pursuant to the Order for Consolidation which had been made on October 24, 1930, pursuant to and in approval of the Stipulation of the parties of the same date.

(n) *Plaintiff's Motion for Leave to Take Testimony on Behalf of Plaintiff.*—After the submission of the instant cause and while it was pending determination by the Court, counsel for plaintiff filed a motion and then an amended motion on May 8, 1931, for leave to take testimony on behalf of plaintiff (R. 13-14).



*The Thompson case was submitted to me pursuant to a stipulation voluntarily entered into by counsel for the parties. (Italics ours.)*

The Court then stated (R. 15)—

I have no right to compel either side to modify that stipulation.

In view of the peculiar situation which had developed, however, the Court suggested one of two courses to be followed (R. 15-16), namely—

That counsel may stipulate that the evidence set forth in the amended motion for leave to take testimony shall be considered as formally offered in this case. In that event I will adopt the same findings of fact as have been made in the case of *Reichsbank v. Sutherland*, Equity No. 51,537.

If counsel are unwilling to enter into this stipulation the order of consolidation signed on October 24, 1930, will be rescinded, and counsel may proceed in this case as they are advised.

Thus, plaintiff, notwithstanding his Stipulation of October 24, 1930, was advised by the Court that the matters which were not formally in evidence had received the Court's consideration but had not changed the Court's conclusion. And with this advice, the Court afforded the plaintiff an opportunity to be relieved of the Order for Consolidation and then to proceed in this cause as he might be advised.

(q) *Plaintiff's Election*.—It should be noted that the Court specifically stated that, if the parties agreed, the evidence set forth in the amended motion



for leave to take testimony should be considered as formally offered in the case, they could so stipulate, but that if they were unwilling to so stipulate, the Court would rescind the order for consolidation.

However, on July 2, 1921, counsel for plaintiff filed an "Election" (R. 16) in which they elected—

that the order of consolidation entered herein consolidating Equity Suits No. 51,537 and 51,612 shall continue

and in which they further elected—

that the testimony referred to in the amended motion to offer testimony shall be considered as formally offered.

The election left the matter in the same status as it was before the filing of the Memorandum of the Court of June 8, 1931. Though it was obvious that the proposed evidence attached to the amended motion for leave to take testimony was not formally in the record and could only be gotten into the record by a stipulation of the parties on both sides, and though it was equally obvious that the order for consolidation would only be rescinded by the Court in the event the parties (meaning, of course, the parties on both sides) were unwilling to so stipulate, counsel for plaintiff elected to continue in force the order for consolidation.

Consistently enough, counsel for plaintiff did not elect that the testimony referred to in the reply of defendants filed May 18, 1931, to the amended motion for leave to take testimony, should "be considered as formally offered."



(r) *Stipulation of April 27, 1932.*—Finally on April 27, 1932, the parties, by leave of court (R. 18), filed a stipulation (R. 17-18). It was therein agreed:

1. That the proposed evidence set forth in the amended motion for leave to take testimony filed in the above-entitled case on May 8, 1931, shall be considered by the Court as having been formally offered and admitted in evidence in this case.

2. That the reply statement of the defendants filed on May 18, 1931, be made a part of the record in this case, and that the five exhibits attached to said reply statement shall be considered as formally offered and admitted in evidence in this case.

(s) *The Findings of Facts and Conclusions of Law.*—Thereafter, and on April 28, 1932, the Court made and filed its findings of fact and conclusions of law (R. 18-23). The Court found (Finding 2, R. 18-19) as to the seizure of \$5,075,951.78 and the deposit thereof in Trust No. 9322 in the name of "Undisclosed Enemy No. 1." The Court then found (Findings 3, 4, 5, and 6, R. 19), as follows:

3. Neither the Imperial Government of Germany nor the German Republic has ever been the owner of the said funds, above described, or any part thereof, and neither of said Governments has ever claimed any right, title, or interest in or to said funds.

4. The Imperial Government of Germany was not the owner of the credit balance of \$5,075,951.78 with Lee, Higginson & Company



at the time of the said seizure of said credit balance by the Custodian in January 1918 as the property of "Undisclosed Enemy No. 1," or any part thereof.

5. The Reichsbank was, prior to January 31, 1917, and has been at all times since, a private corporation, organized and existing under and by virtue of the laws of Germany, carrying on a general banking business. The shares of said stock were, prior to January 31, 1917, and at all times since have been, owned by private persons.

6. The Government of Germany has never been the owner of the Reichsbank or any part thereof, or of any right of its funds, and has not, nor ever had, or claimed, any right, title, or interest in the funds held by the Alien Property Custodian, from which the plaintiff seeks to recover said alleged debt by this suit.

The Court then finds as to the demand made by the Reichsbank as owner of the funds (Finding 7, R. 19). Next, the Court finds as to the history of the funds prior to their seizure by the Alien Property Custodian (Findings 8, 9, 10, 11, and 12, R. 19-21). Then, the Court finds as to the deduction and disbursements of \$2,200,000.00 from said funds (Finding 13, R. 21) as follows:

In August 1921, the German Minister of Finance on behalf of the German Government, being desirous of paying as soon as possible, certain Treasury notes issued by the German Government in the United States and payable in the United States in dollars, which had become due, and having been informed that



the Alien Property Custodian would be inclined to satisfy the claims of American owners of these notes by releasing funds in his possession for that purpose, requested the Reichsbank to assent to the release of its funds in the hands of the Alien Property Custodian for payment to American owners of these German Treasury notes. The Reichsbank after negotiations with the German Minister of Finance extending over a period of several months in which the German Government agreed to repay to the Reichsbank the amount of its funds transferred and used for the purposes aforesaid agreed to and, in December 1921, did sign an assent to the use of its funds in the possession of the Alien Property Custodian for the payment of claims of American note holders of German Dollar Notes, to the extent of \$2,000,000.00. Later, on or about the 5th of August 1922, said Reichsbank assented to the use of an additional sum of \$200,000.00 of its funds in the possession of the Alien Property Custodian for the purposes provided for in the original assent and subject to the limitation thereof. After the execution of this assent the Custodian used \$2,200,000 of the funds of the Reichsbank which had been deposited in Trust No. 9322 "Undisclosed Enemy No. 1", for the payment of said obligations of the German Government and the German Government thereafter paid the Reichsbank the said sum of \$2,200,000.

The Court then finds (Finding 14, R. 21-22) as to the seizure of \$41,151.87; the deposit thereof in Trust No.



465 to the credit of Reichsbank Direktorium; and the payment therefrom of \$10,000.00 to the Reichsbank. As to said funds, the Court finds (Finding 15, R. 22) as follows:

Neither the Imperial Government of Germany nor the German Republic has ever been the owner of the funds, above described in paragraph 14 of this finding of facts, or any part thereof, and neither of said Governments has ever claimed any right, title, or interest in said funds. The Imperial Government of Germany was not the owner of the credit balances with Kuhn, Loeb & Co., Speyer & Company and J. & W. Seligman & Co. of New York, which aggregated the sum of \$41,151.87 described in paragraph 14 of this finding of facts, or any part thereof, at the time of the seizure of said credit balances by the Custodian.

On the Findings of Fact, the Court concluded that plaintiff had not established its cause of action; that "the Court has no right to compel either side to modify the stipulation filed herein on October 24, 1931" (NOTE: the figure 1931 is obviously in error and should be 1930); and that the bill of complaint should be dismissed (R. 22-23).

To the Findings of Fact and Conclusions of Law, plaintiff noted its exceptions on April 28, 1932 (R. 23).

(t) *The Final Decree.*—On the same day, April 28, 1932, the Court made and entered its Final Decree dismissing the bill of complaint with costs (R. 23). Thereupon, counsel for plaintiff noted an appeal to



this court (R. 23) and, on July 21, 1932, filed their Assignment of Errors (R. 24-26).

(u) *The Book or Pamphlet entitled "German Imperial Banking Laws."*—As stated hereinbefore, during the oral argument of this case, counsel for plaintiff handed to the Court a book or pamphlet entitled "German Imperial Banking Laws." This pamphlet is set forth in the record (R. 99-324). It was never formally offered nor received in evidence. It was not a part, by reference or otherwise, of the amended motion for leave to take testimony (R. 13-14; 73-90). Nor was it stipulated into evidence under the Stipulation of April 27, 1932 (R. 17-18). Counsel for defendants objected to the said pamphlet being made a part of the record, on the ground that it was not offered in evidence. However, counsel have stipulated that it might be incorporated in the record "on appeal with the full right of counsel for the defendants to object to the consideration thereof by the Court of Appeals" (R. 97). Subject to such objection, it was made a part of the record on September 15, 1932, as of July 21, 1932 (R. 98).

(v) *Conclusion.*—We realize that this Statement of the Case is lengthy and we pray the Court's indulgence therefor. But the peculiar and unusual course which this case has taken has made it humanly impossible to shorten it and at the same time give the Court a picture of the precise situation which existed and now exists. It discloses a Stipulation entered into voluntarily and with full knowledge of all the facts and then a determination to withdraw therefrom with or without the consent of the Court



or of the opposite parties. We confidently assert that, aside from the fact that the findings, conclusions, and decree of the court below are obviously correct and free from error, the very statement of the case alone shows that an affirmance should follow as a matter of course.

#### PROPOSITIONS OF LAW

The propositions of law are as follows:

I. The Book or Pamphlet Entitled "German Imperial Banking Laws" is not in evidence in this case and should not be considered by this Court.

II. The Findings of the Court should not be disturbed.

III. The Evidence clearly establishes that the funds in controversy never belonged to the German Government.

IV. The Appellant's contention that the Court erred in refusing to grant his motion to take further testimony.

V. The Appellant is precluded in this suit from satisfying his claim against any monies which may be in the hands of the Alien Property Custodian to the Credit of the German Government.

#### ARGUMENT

##### I

**The book or pamphlet entitled "German Imperial Banking Laws" is not in evidence in this case and should not be considered by this court.**

This pamphlet appears in this record at pages 99-324. The record shows conclusively that it was handed to the Court during the argument and never,



at any time, was it offered, stipulated, or received in evidence. Surely, our objection made to this document in the court below is sound and unanswerable. But counsel for appellants have been most insistent and we, therefore, did agree that the pamphlet might be included in this record with the specific reservation of our right to here object to the consideration thereof in this Court.

We here and now object to the consideration of the pamphlet, or any of it, by this Court and we so object on the grounds that it has never been offered, stipulated, or received in evidence in this case and is, therefore, no part of the record herein.

It is not only the right but also the duty of the appellees herein to see to it that the funds here involved shall be held, protected, and administered for the owners thereof. The appellees may not, therefore, lightly treat this case in violation of every principle of orderly procedure. In a very real sense, appellees stand here as trustees for the owners and they may not acquiesce in the evasion nor violation of rules of law and of courts which are as clearly applicable in cases of this character as they are in other cases.

We respectfully submit that this case has been prosecuted by appellants as though, somehow, the usual laws and rules of procedure have no application to this case. The Stipulation of October 24, 1930, was voluntarily entered into by them with full knowledge of the entire situation then existing and of all the facts. The evidence having been presented



in Equity No. 51537, appellees were apparently of the view that such evidence would sustain their contentions in this case and, being of such view, it was but natural that they should seek to stipulate such evidence to be their evidence in this case and thus save the delay and expense which would otherwise be entailed. But at the argument counsel apparently apprehended that such evidence not only did not sustain their case but actually defeated it. It was then that counsel handed this pamphlet to the Court in an attempt to defeat thereby their own stipulation. Necessary formalities of orderly procedure could be avoided, as counsel apparently viewed the matter, and not even the elementary principles applicable to the introduction of books and particular portions thereof need be adhered to. Later, this apparent disregard for necessary adherence to fundamental principles governing the offer and admission of evidence was emphasized by the "election" of counsel to wholly disregard the letter and the spirit of the Court's Memorandum of June 8, 1931. And now, it is again emphasized by the free quotations from this pamphlet in appellant's brief and by arguments adduced therefrom, all on the assumption, which clearly and unequivocally has no basis whatsoever, that "the appellant Thompson, has offered in evidence the laws by which the Reichsbank was created and the statute governing its operation" (Brief, p. 15).

Nothing is better established in law than the elementary proposition that a book or pamphlet to be in evidence must be formally offered, admitted, and



received in evidence. Not only that, but a 325-page pamphlet may not be dumped into a record without any effort whatever to identify the particular portions thereof which are relied upon. Surely there is no rule of law which even remotely permits the introduction of a pamphlet into evidence by the simple expedient of handing it to the Court on the argument of the case. Were such practice to be permitted, it would not be long until every vestige of the orderly administration of justice would be effectively destroyed.

Appellees are convinced that the funds here involved were never the property of the Imperial German Government and that they are and always have been the property of the Reichsbank, a private corporation. If they believed that they have been wrong in that conviction, they would welcome a correction of their error because their interest is not in any particular owner but only in being sure that the funds are owned by the claimants thereof.

As a matter of fact, the pamphlet was considered by the court below (R. 15; R. 97) in an apparent effort to give earnest and careful consideration to every scrap of possible matter relied upon by appellants, but the court found nothing in the pamphlet to alter its conclusions. The fact remains that the pamphlet never has been offered, nor admitted in evidence and that it has no place in this record now.

For the reasons stated, we must and we do object to the consideration by this Court of this pamphlet or any part thereof.



## II

**The findings should not be disturbed**

The question in this case is whether the funds involved were the property of the German Government. Incidental to this question, is the question of whether or not the Reichsbank was a private corporation or was so owned or controlled by the German Government as to make the funds those of the German Government itself rather than the funds of a private corporate citizen of Germany.

The court below has found (R. 19; R. 22) that the Government of Germany has never been the owner of the funds nor claimed any right, title, or interest in them; that the Reichsbank is and was, at all times, a private corporation and that the shares of stock of said bank have, at all times, been owned by private persons; and that the German Government has never been the owner of the Reichsbank nor of any part thereof.

The evidence upon which the Court has made its Findings consists of testimony of witnesses given in other proceedings, documents, letters, and affidavits.

The general rule which prevails in all jurisdictions is that the trial court's findings in a suit in equity will not be disturbed except for obvious error in the application of the law or serious or important mistake in the consideration of the evidence. And such is the rule in this court.

*Manning v. American Security & Trust Co.*,  
50 App.D.C. 194;  
*Beall v. Plugg*, 57 App.D.C. 69;  
*Castleman v. Avignone*, 56 App.D.C. 253;  
*Hopp v. Calloway*, 52 App.D.C. 3.



In this case there has been no obvious error in the application of the law nor serious or important mistake in the consideration of the evidence.

Another principle equally well settled and strictly adhered to is that a finding or decree of the trial court on conflicting evidence will not be disturbed, unless clearly erroneous or against the preponderance of the evidence.

*Harding v. Hart*, 113 Fed. 304;

*Vanderbilt v. Bishop*, 199 Fed. 420;

*Ricketts v. United States*, 59 App.D.C. 47.

We confidently assert that the evidence in this case overwhelmingly sustains the findings of the court below. As a matter of fact, when the evidence is considered in the light of its true import and freed from illogical deductions which cannot flow from the evidence but which can only flow from immaterial and irrelevant references to assertions as to the relation of certain German citizens to the German Government during the war, the findings and conclusions of the Chancellor are inescapable. But if, by any chance, it might be said that there was conflicting evidence, some of which if standing alone might sustain some part of appellant's contentions, surely this record discloses that the very best that can be said for it is that the evidence was conflicting and that the great preponderance of the evidence necessarily begot the findings made by the Court.

We respectfully submit, therefore, that the findings of the Court below, based, as they are, upon the preponderance of the evidence and upon applicable prin-



ciples of law, should be conclusive in this Court and should not be disturbed.

### III

#### **The evidence clearly establishes that the funds in controversy never belonged to the German Government**

It is pertinent to observe at the outset of this discussion that the issue is clear and that nothing is to be gained by the beclouding thereof. And we respectfully submit that when there is extensive discussion of matters which cannot possibly have even a remote bearing upon the issue and deductions and inferences indulged in which are equally foreign to the real questions involved, the issue is beclouded.

Thus, the question may not be decided from an extensive discussion of the historical fact that we have had a war with Germany and that Dr. Albert and Dr. Heynan were active agents of the German Government in this country. It is admitted that the Reichsbank was an enemy alien and it is presumed that that institution was as loyal to its country and its cause as were the banks of our country loyal to our country and its cause. We doubt not that the Reichsbank was as active in lending financial assistance to Germany as were the banks of this country in lending financial assistance to the United States and, just as the citizens and institutions of this country gave aid in such manner as seemed to augur for the success of our country, so also may it be assumed that the citizens and institutions of our enemy countries gave aid in like manner to their countries.



But there is nothing in the Trading with the Enemy Act which precludes the recovery, by enemies who aided their countries in the war, of property seized during the war. If such were the fact, the provisions of the Act for the restoration of property to enemy aliens would be nullities because it is to be presumed that practically all of such owners were intensely loyal to and active in support of their respective countries during the war.

These, of course, are self-evident propositions and we merely emphasize them because we submit that when the evidence offered and relied upon by appellants and their argument is analyzed, we find that it does not sustain their contention that these funds were or are the property of the German Government, but merely sustains the admitted propositions that we recently were at war with Germany and the admitted fact that the Reichsbank, a private corporation of that country, was a loyal citizen thereof.

(a) The Cases of *United States v. Securities Corporation General, et al.* and *White et al. v. Mechanics Securities Corporation, etc.*—In their Brief (pp. 8–14), appellants discuss and quote from these cases. These cases were decided by this Court on March 2, 1925 (55 App. D.C. 256 and 261). They were decided by the Supreme Court on December 14, 1925 (269 U.S. 283).

The suits were on notes against the Imperial German Government and it was sought to recover the amounts due thereon from funds in the hands of



the Alien Property Custodian and alleged to be funds of the German Imperial Government.

This Court pointed out at page 259 of its Opinion in the Securities Corporation case that—

there appears in paragraph 8 of the bill of complaint the following allegation: "That the Alien Property Custodian now has in his possession or to his credit in the Treasury of the United States funds of the Imperial German Government, which were paid and delivered to him under the provisions of said Trading with the Enemy Act, as amended, and which are available by law, sufficient to pay the entire indebtedness, both principal and past due interest owing to complainant"

and (p. 260) that the defendants, in their answer, had demanded "strict proof" of such allegations. This Court further pointed out (p. 260) that, in support of their allegations in paragraph 8 of their bill of complaint, plaintiffs offered in evidence the answer which had been filed by the same defendants in the analogous case of *White et al. v. Mechanics Securities Corporation, etc.*, and as to such answer the Court stated (p. 260):

The answer in that case, made under oath by the defendants, set forth that the Custodian had turned over to the Treasurer \$515,571 which was deposited in Trust No. 555—Special, "Imperial German Government", and that there had been transferred to the same trust \$2,200,000 from Trust No. 9322, "Undisclosed Enemy No. 1", making a total



*credited to Trust No. 555—Special, “Imperial German Government” of \$2,715,571. (Italics ours.)*

This Court, then, specifically stated what appeared in the pleadings and evidence, namely, that the specific sum of \$2,200,000 which had been deposited in “Trust No. 9322, ‘Undisclosed Enemy No. 1’” had “*been transferred*” from that trust to “Trust No. 555—Special, ‘Imperial German Government’”. This *transfer* was made, as stated in the Opinion (p. 260), on March 8, 1923. And this Court observed that:

The truth of these statements is not controverted.

However, the Court pointed out that the Alien Property Custodian had by letter of March 14, 1924, attempted to—

withdraw the instruction sent to the Secretary of the Treasury, under date of March 10, 1923, directing *the transfer* of the \$2,200,000 from Trust No. 9322 to Trust No. 555—Special, “Imperial German Government.” (Italics ours.)

and that the objection to defendant’s offer of evidence to show such withdrawal had been sustained and that the counsel for defendants in support of their contention that the Alien Property Custodian had authority to thus shift the fund during the pendency of the actions had argued in their brief that—

the plaintiff in the cause must rely as to the \$2,200,000 above upon the instructions given



by the Custodian after the money had been seized as belonging to an unknown enemy. If the Custodian had authority to change the ownership of the money at the time referred to in the original answer, he had just as much authority to change it and order it held to the credit of the unknown enemy again.

As to this contention, this Court stated (p. 260):

We are not impressed by this contention. The *transfer* of the \$2,200,000 to Trust No. 555—Special, "Imperial German Government", on March 8, 1923, was a determination by the Custodian of the enemy ownership of the fund. It amounted to a finding, after investigation, that the fund should be held "for, by, on account of, or on behalf of, or for the benefit of" the Imperial German Government. There was no change of the ownership by the Custodian when the fund was transferred on March 8, 1923, *since there is nothing in the record to indicate that the ownership up to that date had been specifically determined.* The Custodian then, exercising the power imposed upon the President, *determined specifically the enemy ownership of the fund.* In further support of the lack of evidential effect of the letter of March 14, 1924, *it contains no reasons, nor "is it supported by any evidence, which challenges or affects the correctness of the former determination of enemy ownership."* (Italics Ours.)

Thus, it is clear that the specific funds involved were \$2,200,000 and it is equally clear that the entire funds held in Trust No. 9322 to the credit of "Unknown



Enemy No. 1" were not involved. What this Court determined was that since the \$2,200,000 was in a Trust which by its very name, to wit, "Unknown Enemy No. 1" would indicate that its ownership had not been determined and since there was "nothing in the record to indicate that the ownership \* \* \* had been specifically determined" to be in a known or specific person prior to March 8, 1923, the order of March 8, 1923, of the Alien Property Custodian, to transfer the \$2,200,000 to Trust No. 555—Special, Imperial German Government amounted in law to a determination on that date that the \$2,200,000 was the property of the Imperial German Government.

On appeal to the Supreme Court, the decrees were affirmed (269 U.S. 283). On the question of the transfer of the \$2,200,000, the Court stated:

With regard to the evidence, the contention on behalf of the United States does not seem to us to need more than a word of reply. The facts admitted by answer under oath of the Custodian and the Treasurer in one of the cases were that the Custodian determined after investigation that five hundred and fifteen thousand five hundred and seventy-five dollars were owing to the German Government, that he demanded and received them under the Act, paid them to the Treasurer, and holds them in a special trust; *that he afterwards collected and paid over to the Treasurer five million dollars in a special trust as from an unknown enemy, but determined that two million two hundred thousand dollars of the latter sum*



*were held when he received them for the Imperial German Government, and directed the Treasurer to transfer that amount to a special account to the credit of the Imperial German Government and that this was done. It was pressed at great length that the Custodian had no authority to determine the fact, especially after the money had been transferred to the Treasurer. But it is immaterial whether he had that authority or not. He had authority to answer in his own case, and the admission of the two defendants under oath is evidence against them in other cases as it would be conclusive against them in the one where it was filed, in the absence of any evidence to the contrary. Pope v. Allis, 115 U.S. 363. No evidence to the contrary was given in any of the cases nor was any reason shown to doubt the fact.*

Here again it is clear that the Court was dealing solely and exclusively with \$2,200,000 and the transfer thereof. Indeed, it is emphasized that the entire fund of \$5,000,000 was not subject of the decision and that only the \$2,200,000 which was transferred from such fund was involved.

In their Brief filed herein appellants attempt to draw from the language of this and the Supreme Court in these cases, the deduction that they are authority for the proposition that the entire \$5,000,000 in Trust No. 9322 in the name of Undisclosed Enemy No. 1 were owned by the Imperial German Government. Obviously, no such deduction is warranted. In the instant case, defendants have offered specific evidence to show the exact facts as to the transfer of



the \$2,200,000 from Trust No. 9322 to Trust No. 555. What this Court and the Supreme Court found and determined was that under the pleadings and the evidence in those cases, the direction of the Alien Property Custodian on March 8, 1923 for the transfer of the \$2,200,000 from Trust No. 9322, Undisclosed Enemy No. 1 to Trust No. 555, Special, Imperial German Government was a determination on that date that the \$2,200,000 transferred on that date was the property of the Imperial German Government. We emphasize that the decision of this and the Supreme Court were naturally predicated upon the records in those cases and that both this court and the Supreme Court very carefully stated that there was no evidence in those cases "to the contrary" and that there was no "reason shown to doubt the fact".

(b) *The Case of Reichsbank etc. v. Howard Sutherland et al—Equity No. 51537.*—It was not until nearly five years after the decisions of this and the Supreme Court in the cases, *Securities Corporation General* and *Mechanics Securities Corporation supra*, that the case of *Reichsbank etc. v. Sutherland et al.*, Equity No. 51537 was filed. The Bill of Complaint was filed on June 11, 1930 (R. 26). It was therein alleged that the Reichsbank was the owner of the entire funds of more than \$5,000,000 which had been originally deposited and carried in Trust No. 9322 in the name and to the credit of "Undisclosed Enemy No. 1". As to such alleged ownership, the defendants, in their Answer filed on June 25, 1930 (R. 29)



demanded strict proof (R. 31). In the matter of such alleged ownership, the parties by a Stipulation of June 26, 1930 (R. 32) stipulated into evidence extracts of testimony of witnesses taken in another case, to wit, *Equitable Trust Co. v. Miller* in the United States District Court for the Southern District of New York; certain letters passing between the Reichsbank and other banks; and certain affidavits. These extracts, letters, and affidavits appear in the Record pp. 42-62 and are referred to therein as Exhibits 1 to 25, inclusive.

No claim was made for the return of the entire funds of more than \$5,000,000. It was specifically alleged that the sum of \$2,200,000 had been paid out of the \$5,000,000 "by and with the consent of the Reichsbank Direktorium" (R. 28) and the claim was, therefore, for the \$5,000,000 less the \$2,200,000 which had been paid out. These allegations were specifically admitted in the Answer (R. 31).

Since it was alleged that the entire funds of more than \$5,000,000 in the name of "Undisclosed Enemy No. 1" belonged to the Reichsbank and since it was alleged and admitted that \$2,200,000 thereof had been paid out "by and with the consent of the Reichsbank Direktorium" and since no effort was being made to recover the \$2,200,000 in this suit, it is apparent that no evidence as to the \$2,200,000 was needed. However, the fact remained that the \$2,200,000 had been the subject of extensive litigation and, while no reasonable deduction could flow from the decisions that it had been judicially determined that



the entire funds to the credit of Undisclosed Enemy No. 1 were funds of the Imperial German Government, still all the facts could and should be laid before the Court and thus preclude the possibility of mistake. Accordingly the parties by stipulation of October 3, 1930 (R. 35) stipulated into the record the facts as to the transfer of the \$2,200,000 from Trust No. 9322 to Trust No. 555. Such facts appear in Exhibits 1B to 15B inclusive (R. 62-71).

In the Bill of Complaint it was specifically alleged (R. 26) and in the Answer, it was specifically admitted (R. 29) that the Reichsbank "is now and has been since prior to April 6, 1917, a private corporation organized and existing under and by virtue of the laws of Germany, carrying on a general banking business." No evidence, then, was needed as to that allegation. But notwithstanding such lack of necessity, evidence of such fact was stipulated into the record on June 26, 1930 (See Exhibits 24 and 25—R. 61-62), and on the submission of the case, there was offered and received without objection two more documents to sustain such allegation (R. 71-72).

(c) *The Issues and the Stipulation in this Case.*—It was not until after the Stipulations of June 26, 1930, and of October 3, 1930, had been filed in Equity No. 51537 that the Bill of Complaint was filed on October 13, 1930, in this case (R. 1). And it was thereafter, and on October 24, 1930, that the Stipulation, making the evidence of ownership in Equity No. 51537 the evidence of ownership in this case, was filed (R. 5).



The allegations of the bill of complaint respecting the status of the Reichsbank (Paragraph III of Bill, R. 2) are as follows:

That the defendant Reichsbank *now claiming* to have been organized under the laws of Germany as a private corporation *was at all times hereinafter mentioned a part of the Government of Germany*, but is sued in its own right herein by reason of its claims and demands hereinafter alleged, but in connection therewith plaintiff alleges *it was not a private corporation on the 28th day of April 1917 or operating as a private corporation in the matters herein alleged, but was the agent of and controlled in said matters by Germany, in the interest of Germany and alien enemies of the United States and its allies in the then pending war with Germany.*

These allegations are specifically denied in the answer (R. 9).

Thus it would appear that while appellants could not and would not allege that the Reichsbank was not a private corporation engaged in the general banking business, they alleged that "*in the matters herein alleged*" it was not operating as a private corporation but was a part of the German Government and was the agent of and controlled "*in said matters*" by Germany. The "matters herein alleged" are set forth in Paragraph VIII of the Bill (R. 3), where it is alleged that the \$5,000,000 plus "*is not the property of said Reichsbank, but was the property of Germany since a time prior to said declaration of war, and since in fact and by operation of law*"; that the sum was



seized by the Custodian on March 8, 1918; that a portion of the fund was on April 28, 1917, "the property of the Reichsbank and the remaining portion was the property of Germany"; that *"on said 28th day of April 1917, the said Reichsbank and Germany joined said portions in a common fund and transferred the same to the United States of America to be used for benefit of Germany and its subjects and to the prejudice of the United States and its allies then at war with Germany; that said participation of funds constituted a joint tort feason fund without divisible interests and inured to creditors of Germany."*

In the Exhibits which had been stipulated into evidence in Equity No. 51537, it appeared that out of an account which the Reichsbank had to its credit in the Centralbank of Stockholm, Sweden, there had been transferred, at the request of the Reichsbank, to Lee Higginson & Company of New York, the sum of \$5,000,000 and that that transfer occurred on April 28, 1917 (R. 59 and 60).

When we find that the allegation was not that the Reichsbank was not a private corporation but merely that it *"was not a private corporation on the 28th day of April 1917, or operating as a private corporation in the matters herein alleged"* and when we find the allegation that on April 28, 1917, Germany and the Reichsbank transferred the money to the United States to be used for the benefit of Germany, we can understand the willingness of appellants to stipulate as *"the only evidence which will be introduced in this cause with respect to the ownership of funds"* (R. 5),



the evidence then on file in Equity No. 51537. The simple and very apparent fact is that, notwithstanding that it was alleged and admitted in Equity No. 51537 that the Reichsbank was a private corporation, appellants were wholly unconcerned with such admitted fact under their theory that even though the Reichsbank was a private corporation, it was not a private corporation or acting as such "*in the matters herein alleged.*" And the further apparent fact is that appellants were willing and anxious to rely upon the evidence in Equity No. 51537 and to have it taken and adopted as *their* evidence in this case; their theory being that the exhibits as to the transfer of the monies would sustain their allegation that on April 28, 1917, the funds became the common fund of Germany with the Reichsbank.

We think it obvious that the evidence in Equity No. 51537 which was stipulated "*as the evidence of plaintiff in this cause*" and as "*the only evidence which will be introduced in this cause with respect to the ownership of funds*" (R. 5) not only did not sustain appellant's claims and theories but, on the contrary, clearly and conclusively sustained the propositions that the funds in question were not the property of the German Government and were the property of the Reichsbank, a private corporation. In this connection it is interesting to observe that in the stipulation "*as the evidence of the plaintiff in this cause*", appellant stipulated Exhibit 24, which shows that the German Government were never shareholders of the Reichsbank (R. 61); Exhibit 25 which shows that



the German Government never owned any part of the Reichsbank or of its funds (R. 62); and Exhibits 1 B to 15 B showing a course of action between the Reichsbank and the German Government which effectively refutes any possible intimation of Government ownership of the Reichsbank or of its funds. As to this stipulation, it should be further noted that at no time has appellant sought to be relieved from the obligation to have the evidence thereunder taken "as the evidence of the plaintiff in this cause"; what plaintiff sought was "leave to take *further testimony*" (R. 13).

We think it also obvious that the evidence stipulated into the record on April 27, 1932, as the further evidence of appellant, does not sustain its contentions or theories and that the evidence stipulated on behalf of the defendants conclusively refutes it in every detail.

We respectfully submit that appellant should be held to its allegations, and to the theory upon which it has prosecuted this case and that it be not now permitted to abandon in this Court such theory and thus effectively evade the settled and axiomatic rule of law that the appellate court will and can only dispose of the case on the questions properly raised under a proper record in the court below.

(d) *The Book or Pamphlet Entitled "German Imperial Banking Laws" is not Evidence in this Case.*—We have hereinbefore, under Point I of this Brief urged our objection to the consideration by this



Court of the book or pamphlet entitled "German Imperial Banking Laws", or any part thereof on the ground that it was never offered nor received in evidence in this case and was, as clearly appears from the record, merely handed to the trial court by counsel for appellant at the argument of the case.

But if there could be any possible doubt of the soundness of our position (and we respectfully submit that there can be no doubt), then, we submit that appellant may not impeach its own testimony thereby and we further submit that it is necessarily offered by appellant for that very purpose.

We have above pointed out that under appellant's theory of this case as it has been pleaded and prosecuted, appellant was not concerned with the fact that the Reichsbank was a private corporation. It did not plead that the Reichsbank was not a private corporation, but merely pleaded that it was not operated as a private corporation in the matter of the transfer and handling of the fund of \$5,000,000 but, in such matter, it was a part of or the agent of or controlled by the German Government. We further pointed out that, entertaining such views, the appellant freely and willingly stipulated that the evidence in Equity No. 51537 should be considered by the Court "as the evidence of the plaintiff in this cause" and that appellant felt secure that such evidence would sustain its cause and the theory thereof.



In their Brief (p. 14) counsel for appellant state:

It is true that the evidence offered under appellees' stipulation shows the Reichsbank to be a private banking corporation.

The Stipulations in this case are the stipulations of appellant and appellees and the Stipulation of appellant was on October 24, 1930, that Exhibits 24 and 25 (R. 61-62) should be received "as the evidence of the plaintiff in this cause" and those exhibits show conclusively that the Reichsbank is not and never has been a part of the German Government. Not only that, but appellant further stipulated that Exhibits 1-B to 15-B (R. 62-70) should be received "as the evidence of the plaintiff in this cause" and those exhibits show conclusively that the status of the Reichsbank was that of a private corporation.

But, at page 15 of their Brief, counsel for appellant state:

However, the appellant Thompson, has offered in evidence the laws by which the Reichsbank was created and the statute governing its operations which establishes beyond any doubt that the Reichsbank was not a private corporation, but was a mere agency entirely controlled by the German Government having in fact, charge of the Imperial Treasury and handling the receipts and disbursements of the Imperial Government.

Of course, the record shows conclusively that the appellant never "offered in evidence" this book. But, be that as it may, the appellant has never



alleged that the Reichsbank was not a private corporation (but merely alleged that it was not a private corporation "in the matters herein alleged" in the Bill); and has stipulated into the record, as *his evidence*, evidence showing that the Reichsbank is a private corporation. Surely, appellant may not thus impeach his own testimony and lightly change the nature of his case. Surely appellant cannot, without at least pleading and presenting his case in the alternative, prove that the Reichsbank is a private corporation and then attempt to prove that it is not.

(e) *Documents Admitted in Evidence in Equity No. 51537 on Submission of that Case.*—The evidence which had been stipulated by appellant, under the Stipulation of October 24, 1930 (R. 5), "as the evidence of the plaintiff in this cause" was that evidence which had theretofore on June 26, 1930 (R. 32) and on October 3, 1930 (R. 35) been stipulated between counsel for the parties in Equity No. 51537 to be the evidence in Equity No. 51537. This evidence so stipulated in Equity No. 51537 is set forth in the record at pages 42 to 70.

On the submission of Equity No. 51537 counsel for the plaintiffs therein, the Reichsbank, offered and, without objection of counsel for defendants therein, there were received in evidence two additional documents; the one being the sworn statement of two members of the Reichsbank Direktorium that neither the Reichsbank nor its funds ever belonged to the German Government (R. 71) and the other being a statement under seal of the German Minister of



Finance that the German Government has never owned any of the funds of the Reichsbank (R. 72).

Appellant in this case was never a party to Equity No. 51537 but notwithstanding that fact, counsel for appellant entered an objection to such evidence so offered and admitted. Naturally the Court promptly overruled his objection because it was apparent that neither appellant nor his counsel had any right to object to anything that was done in a case to which he was not a party.

The overruling of his objection is now assigned by counsel for appellant as Errors Nos. 12 and 13 (R. 25) and counsel argues as to such alleged error in Point III of his Brief (pp. 56-57).

In the first place, it is obvious that the action of the Court in admitting evidence in Equity No. 51537 is no concern of appellant because appellant was not a party to such suit and had absolutely no standing therein. The Stipulation of October 24, 1930 gave no standing in Equity No. 51537 to appellant. He was as much a stranger to such proceedings as he was in any other case to which he was not a party.

In the second place, it is clear that appellant was only bound by such evidence in Equity No. 51537 as he had stipulated into the record in this case and that, of course, he had not stipulated these two documents into the record. Appellees have never contended that appellant is bound by these two documents.

In the third place, it being clear that these two statements were not in evidence in this case, it is



equally clear and to be presumed that the trial court did not consider nor treat these two documents as part of the evidence in this case. And particularly is this true when the trial court specifically pointed out the material which was not in evidence but which it considered, to wit, the book or pamphlet entitled "German Imperial Banking Laws".

In the fourth place, the two statements were merely cumulative of other evidence in the record, to wit, Exhibit 24 (R. 61) and Exhibit 25 (R. 62), and those two pieces of evidence had already been stipulated into this case "as the evidence of the plaintiff in this cause" (R. 5).

Finally, indulging in the impossible assumption that the admission of this evidence in Equity No. 51537 was an admission of the same in this case and that the trial court so considered it, the error of the trial court would be merely an error in admitting evidence which merely tended to prove facts otherwise established by competent evidence and would not, therefore, be prejudicial error (*McReynolds v. Roberts Co.*, 52 App. D.C. 48).

(f) *The Evidence in This Case.*—That which appears in this record and which *is not in evidence* in this case are (1) the statement, dated August 27, 1928, of the two directors of the Reichsbank (R. 71); the statement, dated December 9, 1930, of the Minister of Finance of Germany (R. 72), and (2) the book or pamphlet entitled "German Imperial Banking Laws" (R. 99-324).



That which appears in this record and which *is in evidence* in this case are (1) the evidence in Equity No. 51537 stipulated "as the evidence of the plaintiff in this cause" under the Stipulation of October 24, 1930 (R. 5), and consisting of extracts of testimony, letters, and affidavits marked Exhibits 1 to 25, both inclusive (R. 42-62), and of letters, etc., marked Exhibits 1-B to 15-B, both inclusive (R. 62-70), and (2) the matter which had been attached to, made a part of, and set forth as newly discovered evidence in appellant's motion for leave to take further testimony (R. 13-14) and which was stipulated as evidence in this cause under the Stipulation of April 27, 1932 (R. 17), and consisting of extracts of testimony, statements, affidavits, etc., marked Exhibits 1 to 8, both inclusive (R. 73-90), and (3) the matter which had been attached to appellees' reply to appellant's motion for leave to take further testimony and which was stipulated as evidence in this cause under the Stipulation of April 27, 1932 (R. 17), and consisting of a letter and affidavits marked Defendant's Exhibits 1 to 5, both inclusive (R. 90-98).

We here emphasize that, in this discussion, we specifically eliminate therefrom any consideration of the book or pamphlet or of the two statements admitted in Equity No. 51,537 on the submission of that case, for the reason that they are not in evidence in this case. We confine ourselves strictly to the evidence in this case.

(g) *It is Conclusively Established that the Reichsbank is and was at all times a private corporation carrying*



*on a general banking business.*—As we have pointed out hereinbefore, it was specifically alleged (R. 26) and specifically admitted (R. 29) in Equity No. 51,537 that the Reichsbank “is now and has been since prior to April 6, 1917, a private corporation organized and existing under and by virtue of the laws of Germany, carrying on a general banking business.”

We have also pointed out that appellant did not in its Bill of Complaint question the private corporate status of the Reichsbank, but merely alleged that it was not a private corporation or acting as such in the matter of the \$5,000,000 fund.

We have also alluded to the fact that the first time that appellant specifically asserted that the Reichsbank was not a private corporation was at the argument when counsel handed the book or pamphlet to the Court. And counsel now earnestly urges such contention notwithstanding their lack of pleading or proof of any facts and now relies solely upon a book or pamphlet which is not in evidence.

But assuming, without admitting, that, by some unknown process, the allegations of the Bill can be taken as allegations that the Reichsbank was not a private corporation, then, we ask, where is the proof of such allegations? No citation of authority is needed in support of the elementary proposition that the burden of proof is at all times upon the appellant to sustain the allegations of the Bill and that it must do so by a preponderance of clear and convincing evidence. Counsel for appellant have not offered in



evidence one single document or bit of evidence to sustain such an allegation.

(h) *The Evidence Shows that the German Government Did not Own or Control and Never has Owned or Controlled the Reichsbank.*—Just as we have pointed out that there are no allegations in the Bill or proof by appellant that the Reichsbank is or was not a private corporation, we now emphasize that there are no allegations in the Bill or proof by appellant that the Reichsbank is or was owned and controlled by the German Government.

The Bill simply alleges that, *in the matter of the fund of \$5,000,000*, the Reichsbank was a part of the German Government or was owned or controlled by the German Government.

(i) *The Evidence Shows Conclusively that the German Government did not Own or Control these Funds and that the Reichsbank was not a Part of the German Government nor the Agent Thereof Nor Owned Nor Controlled by said Government in the Matter of such Funds.*

The evidence which appellant stipulated as the evidence in this cause (R. 5) is uncontradicted that since April 25, 1916, nearly a year before the United States entered the war, the Reichsbank maintained a dollar account with the Centralbank of Stockholm, Sweden, from which account a number of dollar transfers had been made; and that, as the deposits were made by the Reichsbank in the Centralbank, the Centralbank, in its turn, placed corresponding deposits, in its name but for the account of the Reichs-



bank, with the National City Bank of New York (R. 59).

As to the \$5,000,000, it appears that on March 23, 1917, the Reichsbank directed the Centralbank of Stockholm to offer \$5,000,000 of the Reichsbank's funds to the Swiss National Bank of Berne, Switzerland, "at the rate of 4.975" and further directed that the Centralbank, in making the offer to the Swiss National Bank, should do so in the name of the Centralbank and should not mention the name of the Reichsbank (R. 47). It then appears that, in reply to this request of March 23, 1917, the Centralbank advised the Reichsbank that it would execute the offer as requested but would not assume any risk which might be entailed should the Swiss National Bank, after the acceptance of the offer, request of the Centralbank a declaration that the dollars were of neutral origin (R. 47-48), and further that the Centralbank since the first of the year had not been receiving credit advices from the National City Bank for transfers theretofore made and that the Centralbank was, therefore, uncertain as to whether the National City Bank would honor a disposal of \$5,000,000 (R. 48). The Reichsbank replied that it felt sure that the Swiss National Bank would not ask for such declaration and asked the Centralbank to telegraph the National City Bank to pay out of the Centralbank's credit up to \$5,000,000 and assuring the Centralbank that it, the Reichsbank, would assume any damages arising out of the advances; the Reichsbank further requested the Cen-



tralbank to correspond with the Swiss National Bank by letters and not by telegraph (R. 48).

With these formalities concluded the Centralbank on March 30, 1917, offered the Swiss National Bank \$5,000,000 "payment New York by the National City Bank of New York, at the rate of 4.975 Swiss usage" and, on the same day, the Centralbank advised the Reichsbank of the offer and assured the Reichsbank that the name of the Reichsbank had not been mentioned in the offer (R. 48-49).

On or about April 5, 1917, the Swiss National Bank advised the Centralbank that it had received the offer but that it had no immediate need for such an amount of dollars and would not, therefore, accept the offer at the rate of 4.975. But, the Swiss National Bank further stated that it would accept the \$5,000,000 at the rate of 4.85 Swiss usage and could use it to cover an American loan of \$5,000,000 to the Swiss Federation, which loan would be due the following February. At the same time the Swiss National Bank advised that if the counteroffer of a rate of 4.85, instead of 4.975 was accepted, then the Swiss Bank desired the Centralbank to make payment not to the National City Bank but to Lee, Higginson & Company of New York "in favour of Banque Nationale Suisse (the Swiss National Bank), Direction Generale, Berne on account of Confederation Suisse" (R. 50).

The Centralbank advised the Reichsbank of such counteroffer by the Swiss National Bank (R. 49-50) and, on April 10, 1917, the Reichsbank countered with an offer of a rate of 4.8921 (R. 50-51). There-



after, and on April 28, 1917, the Centralbank advised the Reichsbank that the Swiss National Bank had accepted the offer at a rate of 4.8921 (R. 51).

The transaction was, then, closed and all that remained were the details. On April 19, 1917, the Swiss National Bank requested the Centralbank to make the necessary arrangements with New York for the transfer of the funds to the credit of the Swiss National Bank and the Centralbank replied that it had cabled the National City Bank to make the payment of \$5,000,000 to Lee, Higginson & Company accordingly (R. 51-52).

On May 5, 1917, the Centralbank advised the Swiss National Bank that it, the Centralbank, had received a cable from the National City Bank that our Government authorities demanded a full explanation of the nature of the transaction involving the transfer of \$5,000,000 to Lee, Higginson & Company for the account of the Swiss Confederation and that the Centralbank had cabled the National City Bank the disposition as had been directed by the Swiss National Bank when it had made its counter offer of a rate of 4.85. It further advised that if further declarations were required the New York banks would correspond directly with the Swiss National Bank. (R. 52-53.)

On June 15, 1917, the Centralbank advised the Reichsbank that it, the Centralbank, had that day received a message from the National City Bank that that bank had paid the \$5,000,000 to Lee, Higginson & Company, and that it, the Centralbank, had immediately advised the Swiss National Bank of such pay-



ment and had asked the Swiss National Bank for confirmation that the Swiss Bank was keeping the countervalue at the disposal of the Centralbank. (R. 53.)

On July 2, 1917, the Swiss National Bank advised the Centralbank that it, the Swiss National Bank, had received a cable from Lee, Higginson & Company that the \$5,000,000 had been received from the National City Bank by Lee, Higginson & Company on June 11th, but that Lee, Higginson & Company were holding these funds in suspense on their books at the request of our Government pending approval by our Government of such transfer. The Swiss National Bank, therefore, advised the Centralbank that since a definite credit of the amount had not been made to the Swiss National Bank by Lee, Higginson & Company, the Swiss National Bank would not place the countervalue in francs at the disposal of the Centralbank, until such definite credit had been made to the Swiss Bank by Lee, Higginson & Company. (R. 54-55.)

Finally, on October 3, 1917, the Centralbank advised the Reichsbank that the Swiss National Bank had advised the Centralbank that it, the Swiss National Bank, had received advice that a definite transfer of the \$5,000,000 from the National City Bank to the Swiss National Bank could not be made and that, therefore, the Swiss National Bank cancelled the transaction. (R. 56.) Again, on January 29, 1918, the Swiss National Bank, in support of its cancellation of the transaction on October 3, 1917,



advised the Centralbank that the \$5,000,000 had been transferred to the Alien Property Custodian as enemy property. (R. 56.)

It is obvious that this \$5,000,000 never became the property of the Swiss National Bank because the agreement under which it would have become its property was never carried out. And it is equally obvious that it was not, when seized, the property of the Centralbank because it had definitely been credited by that bank to the Reichsbank and was, in fact, a withdrawal by the Reichsbank of its funds from its deposits with the Centralbank. All parties are agreed, and necessarily so, that the money when seized was money belonging to German aliens, the appellant contending that it was the property of the Government of Germany and the appellee contending that it was the property of a private corporate citizen of Germany.

Now, the mere narration of the transactions shows conclusively that the money belonged to the Reichsbank. Nowhere in this evidence is there the slightest suggestion or possible intimation that any part of it belonged to the German Government.

However, appellant attempts to draw from this evidence the deduction that it shows that the money was the property of the German Government. Much is made in counsel's brief of the fact that there was secrecy, so far as the Reichsbank was concerned, in the transaction. We are told that Sweden was friendly to the Germans in the war and that there was no occasion for secrecy unless the funds were



funds of the German Government to be used by that Government in the prosecution of the war.

It should be borne in mind that the Reichsbank was the largest financial institution in Germany. While it is not so in evidence, we doubt not that the Reichsbank was using much of its funds in loans to the German Government and in financing manufacturers of munitions and supplies and we doubt not that the Reichsbank, a German citizen, was loyal to the German cause and would do everything in its power to aid that cause by the loaning of its funds to individuals, factories, and even to the German Government at any time and in any place where such funds were desired; indeed, it would be an anomaly if it did not do so.

There is nothing new or strange in the practice of large banks in having large deposits in other banks of their own country and in banks of other countries. The obvious purpose is to have available, for loans to their own or other citizens and for investment, monies on deposit in the banks where the loans or investments are or are likely to be made. There are many sound banking reasons for such practice not the least of which are expedition and exchange.

In peace times the practice is universal, but, of course, in war times it is frequently surreptitious if the funds are to be guarded against seizure or confiscation or the practical nullification of their use. And so, the security which a bank in one country has for its funds deposited in banks of another country in times of peace, is assuredly nullified when the two



countries come to war. Not only that, but there is real danger of the practical stoppage of the use of its funds in neutral countries in times of war. Accordingly the necessity for secrecy is apparent if the bank is to continue to do business in such countries.

We, of course, do not know what the Reichsbank intended to do with the funds. For all we know, the bank may have intended to loan them to representatives of the German Government in this country and likewise, for all we know, it may have intended to loan them to representatives of German manufacturers in this country. But such could only be surmises or guesses; the simple fact being that we do not know and there is nothing in this record to show that they were intended for anything but deposit in the course of banking business. What we do know and what we emphasize here is that the evidence shows conclusively that this fund was the property of the Reichsbank and that none of it was or could, by the greatest stretch of the imagination, be construed to be, either "in fact or by operation of law" or otherwise, the property of the German Government. What we further know is that appellant has not only not met the burden to prove that the funds were the property of the German Government but has actually, by its own evidence, proven conclusively that they were and are the property of the Reichsbank.

The balance of the evidence consists of the letters, etc., designated as Exhibits 1-B to 15-B (R. 62-70) and stipulated as the evidence in the case under the



stipulation of October 24, 1930 (R. 5), as well as certain statements, etc., marked "Exhibits 1 to 8" (R. 72-90) and stipulated as appellant's evidence under the stipulation of April 27, 1932 (R. 17), and certain affidavits, letters, etc., marked "defendants' exhibits 1 to 5" (R. 90-97), and stipulated as appellees' evidence under the stipulation of April 27, 1932 (R. 17).

The Exhibits 1-B to 15-B show the negotiations between the Reichsbank and the German Government whereby the \$2,200,000 belonging to the Reichsbank were made available for the payment of German treasury notes held by people in this country. But, notwithstanding the stipulation of these exhibits by appellant as the evidence in this case, appellant earnestly argues that many of them are incompetent. And then appellant seeks to draw therefrom deductions that the funds were actually funds of the German Government and not of the Reichsbank.

Before discussing the evidence in detail, it is necessary that we clarify the situation as to Exhibit 1-B, which is a letter from the Minister of Finance to the Reichsbank, dated August 18, 1921 (R. 62). As will hereinafter appear, the original letter, like all of such letters, was in German. As to this letter, the record situation is as follows: The translation was originally stipulated as evidence in Equity No. 51537 under a stipulation of October 3, 1930, in that case (R. 35-36). Then, under the Stipulation of October 24, 1930, it was stipulated into this case as the evidence of the plaintiff in this cause (R. 5). A photostatic copy of the original letter in German had been filed by the



Reichsbank with the Alien Property Custodian in connection with the claim of the Reichsbank to this fund (R. 93). Notwithstanding the Stipulation, however, counsel for appellant attached a translation of this letter to its motion for leave to take testimony herein and subsequently and on April 27, 1932 (R. 17), such translation was stipulated as "further evidence" of appellant in this case and such translation appears as "Plaintiff's Exhibit 5" (R. 85-86). Attached to the translation is the statement (R. 85) that such translation "is on file with the Mixed Claims Commission as an exhibit in the case of *Equitable Trust Company v. Miller*." But a careful search of the files of the Mixed Claims Commission failed to disclose a case entitled *Equitable Trust Co. v. Miller*, or any such translation (R. 93). However, the defendants, under the Stipulation of April 27, 1932 (R. 17) stipulated into this case the original letter in German as Defendant's Exhibit 1 (R. 90) and a translation thereof as Defendant's Exhibit 2 (R. 91). Thus, there are in this record, the original of this letter (Defs. Ex. 1, R. 90) and three translations thereof (Ex. 1-B, R. 62; Pls. Ex. 5, R. 85; Defs. Ex. 2, R. 91).

It seems clear to us that appellant should not be allowed to confuse the record by relying upon a translation (Pls. Ex. 5, R. 85) which it now argues is different, in material respects, from a translation (Ex. 1-B, R. 62) which is stipulated by appellant.

But, in any event, the appellees have placed in evidence the letter in its original German language (Defs. Ex. 1-R. 90) and followed it with a transla-



tion thereof (Defs. Ex. 2-R. 91). And then that there might be no mistake about the correct translation, they submitted the original and all three translations thereof to an expert, Dr. Wilhelm Tannenbergr, and have set forth his affidavit as to the translations (Defs. Ex. 3, R. 92). Appellant has not attempted to meet this affidavit with any counter affidavit, but apparently insists upon relying upon a translation, the source of which is questioned, but which apparently suits its purpose. And so the word "Reiche" which clearly means "Empire" or "Government" are translated as "Government (Reichsbank)" and whereas the word "Z.E.G." appears in the original directly over the word "Reichsbank" meaning, as explained by the expert (R. 94) "Z.E.G. and/or Reichsbank", the word "Reichsbank" is omitted from such translation (Pls. Ex. 5-R. 85).

Furthermore, this one letter of the Minister of Finance to the Reichsbank dated August 18, 1921, is, as the record shows, but one letter in a chain of letters and when all the letters are considered it appears conclusively that the Reichsbank at all times was the owner of these funds; that the German Government never did own any of them; and that the withdrawal of \$2,200,000 therefrom to be used to pay German treasury notes was on a clear business transaction between the German Government as borrower and the Reichsbank as lender.

That Dr. Albert was most active in this country during the war on behalf of Germany and that he



spent large sums of money for propaganda and for the purchase of supplies, etc., is a matter of history and is not denied. That the Z.E.G. was from January 1915 the Central Purchasing Agency of the Imperial German Government and that practically all of the stock of the Z.E.G. was owned by the Imperial German Government and its states and free cities and that it was a Governmental agency of the German Empire is admitted (R. 81). That Carl Heynen came to this country in April 1915 to assist Dr. Albert in purchasing supplies for the German Government is not denied. That there were necessarily large sums of money available to Albert and Heynen for their work is not denied. That there were funds of the Z.E.G. deposited in the Reichsbank appears to be a fact. No doubt there were funds in the Reichsbank to the credit of the German Government and to the credit of Dr. Albert. And it would not be unlikely that the Reichsbank would arrange for the transfer of some of these funds to this country and that the Reichsbank might, after usual banking arrangements, have made payments direct of bills of Albert, Heynen, the Z.E.G., or the German Government.

We submit that nothing is to be gained in this suit by refighting the war and rehashing the Bridgeport Projectile deal and the many other deals which are matters of history. The simple and inescapable fact is that there is not one bit of evidence offered by appellant to show that the Reichsbank was in any of the matters a part of the German Government and



that the overwhelming evidence in this record, much of which is appellant's own evidence, is that the Reichsbank was a private bank carrying on a general banking business and that its relations with the Government as well as with individuals were always that of banker and client.

And in this case we are dealing with a specific fund of \$5,000,000. The origin and history of the fund is in this record and it shows conclusively that it was at all times the property of a bank, to wit, the Reichsbank. It shows conclusively that this fund, as seized, had its inception in *March 1917* and that in *June 1917* it was definitely sequestered and that at its inception, at the time of its sequestration, and at the time of its seizure, it was the property of the Reichsbank and no one else. The letters passing between the Minister of Finance of Germany and the Reichsbank show that the Reichsbank acted toward the German Government as it would with any other client, namely as a lender to a borrower, and that at no time did it act as though it or its funds were owned by the German Government. It allowed the disbursement of \$2,200,000 from its funds in the hands of the Alien Property Custodian for the payment of German treasury notes under the specific "limitation, that our funds shall not be required before the funds in America belonging to the Z.E.G. and Secretary of State Albert are exhausted" (Ex. 5-B, R. 65). That letter, and others of the same tenor, was written by the Reichsbank to the Minister of Finance of Germany. And when the \$2,200,000 became due,



the Reichsbank insistently demanded from the German Government the repayment thereof (Exs. 12 B, 13 B, and 14 B, R. 69-70) and was finally paid (Ex. 15 B-R. 70). Surely this correspondence does not disclose the Reichsbank as a servant or chattel in relationship to the German Government as its owner or master. And surely, too, it shows that the German Government, never, either directly or indirectly, owned nor claimed to own the fund or any part thereof, and on the contrary it shows conclusively that it belonged and always belonged to the Reichsbank.

We respectfully submit that the matters relied upon by appellant are predicated upon supposition and wholly irrelevant and illogical deductions; that the burden is upon the appellant to prove its case by a preponderance of the evidence; that suppositions and deductions which cannot possibly flow from the evidence do not contribute to the required preponderance; that this case has to do with a balance out of a fund of \$5,000,000 in the hands of the Alien Property Custodian; that appellant's own evidence shows that the money involved is and was at all times the property of the Reichsbank and that none of it ever was, either directly or indirectly, the property of the German Government; and that the entire record discloses that the facts as found by the court below are the facts in this case.

(j) *The Book or Pamphlet Entitled "German Imperial Banking Laws" Shows the Reichsbank to be a Private Corporation Engaged in the General Banking*



*Business.*—We have hereinbefore submitted and urged our objection to the consideration by this Court of the book or pamphlet entitled “German Imperial Banking Laws” which is set forth in the record (99-324), for the reason that it was never offered nor received in evidence in this case, but was merely handed to the trial court at the time of the argument.

However, appellant argues therefrom quite extensively in his Brief. While, therefore, we insist upon our objection, we will discuss it here. In this connection it may be noted that, while the pamphlet was not in evidence, yet the trial court stated in its Memorandum of June 8, 1931, that he “had carefully considered all of the evidence set forth in said amended motion *and the pamphlets submitted*” (R. 15).

1. This book or pamphlet is a printed copy of Senate Document No. 574, Sixty-First Congress, Second Session, being a document received by the National Monetary Commission in connection with its study of National Banking Laws. The document is entitled “German Imperial Banking Laws” and was edited by Dr. R. Koch, former President of the Reichsbank. The document contains what purports to be, and we assume is, a reprint of the German Banking Laws in force at the date when the statement was compiled and in addition thereto contains an introduction by Dr. Koch and certain notes which we assume were written by him, and which are mere expressions of opinion of the writer thereof. Since



this document contains nothing relating to the ownership of the fund claimed by the Reichsbank, which is the only question at issue in this case, we cannot see how it could even have been admitted as evidence had it been offered. It evidently was submitted by counsel for appellant for the purpose of creating some doubt in the mind of the Court as to the correctness of the allegation contained in the Bill of Complaint of the Reichsbank as to its status and character and the admission in the answer of said allegation.

That the Court will not take judicial notice of the laws of a foreign country is a fundamental principle of law too well established to necessitate the citation of authorities. The expressions of the opinion of the writer of the notes in this document have no evidentiary value, and the Court certainly has no authority to take judicial notice thereof. We submit, however, that the provisions of the law, as well as the expressions of opinion contained in the notes, fully sustain the private corporate status and character of the Reichsbank.

Referring first to the Laws in question, the provisions which have a bearing on the character and status of the Reichsbank are as follows: The first chapter of the Bank Act of March 14, 1875, contains general provisions relating to note-issuing banks and their operations, privileges, and limitations. The right of issuing bank notes can only be acquired by Imperial Law. The conditions under which the banks affected by this chapter may lose their privilege of issue are stated in Section 49 of Chapter 3, which



also contains provisions applying to note-issuing banks other than the Reichsbank, and provision is made that if a bank loses the privilege of issue, its shares of uncovered tax-free notes is to be transferred to the Reichsbank. These banks under certain conditions pay to the Imperial Treasury an annual tax of 5 percent on such circulation.

Chapter 2 refers specifically to the Reichsbank and is the Law under which it was established. It is provided (Sec. 12) that the Reichsbank is "subject to the supervision and direction of the Empire" and that the Bank "possesses the right of a legal person." Its duty is to regulate the monetary circulation of the whole Empire, to facilitate payment, and to utilize available capital.

The Reichsbank is charged with certain important duties and responsibilities to the Government, among others (Sec. 22) "to accept payments for the account of the Empire and to make disbursements, according to the amount of the Imperial deposit, without compensation." It "has the right (Sec. 16) to issue bank notes to meet all its business contingencies", as well as other valuable privileges, including the right to establish branch offices. The shareholders of the Bank are not (Sec. 23) personally responsible for its liabilities.

"The Reichsbank and its branch offices are exempt from income and property taxes levied by the States throughout the Empire" (Sec. 21). On the other hand, the Reichsbank (Sec. 24), after paying a dividend of  $3\frac{1}{2}$  percent to its stockholders out of its



profits and adding a certain percentage to its reserves, divides the remaining profits with the German Government.

It is provided in Section 25 that "The Empire is to exercise its supervision over the Reichsbank through a board of trustees, consisting of the Imperial Chancellor, as chairman, and four members." One of these members is appointed by the Emperor and the other three by the Bundesrat. These trustees are to meet four times a year, at which meetings reports are to be presented concerning the condition of the Bank and a general account is to be rendered of the Bank's operations.

It is provided, in Section 26 of the Act of March 14, 1875, that "The Empire is to direct the Bank through the Imperial Chancellor and the subordinate Reichsbank board of directors", and further, that "the Imperial Chancellor is to direct the whole bank management according to the provisions of this Act and the Statute to be enacted; he is to ordain the business instructions for the Reichsbank board of directors and for the branch offices, as well as the rules and instructions for the officials of the Bank; and he alone can authorize the necessary changes in existing business regulations and instructions.

It is provided (Sec. 27) that "The Reichsbank Board of directors is the managing and executive authority as well as the official representative of the Reichsbank \* \* \* . The President and the members of the Reichsbank board of directors are appointed for life by the Emperor on the nomination



of the Bundesrat", and Section 28 provides "The members of the board have the rights and duties of public functionaries" and "No official of the Reichsbank may hold shares of the same."

Section 31 provides that "The central committee is to be the permanent representative of the stockholders in connection with the management." They are "elected by the stockholders at a general meeting. The committee must meet at least once a month."

Section 32 provides that at the monthly meeting of the Central Committee, reports must be made to it with regard to the weekly items of discounts, loans, note circulation, cash deposits, etc., and as "to the opinions and suggestions of the Board of directors concerning the general progress of business and the necessary regulations." There follows a list of questions concerning which the suggestions of the Central Committee must receive special consideration, and other questions with regard to which the determination of the Central Committee is final.

Section 34 provides:

The permanent special control over the management of the Reichsbank is to lie in the hands of three members elected for the term of one year by the central committee;

The supervisors are required to study the course of business and examine the books of the Reichsbank, and Section 35 provides:

Business may be carried on with the financial administration of the Empire or of a German State only so far as allowed by the provisions of this Act and of the bank statute. In case



of necessary deviations from the general business course of the bank all new plans must first be submitted to the Supervisors, and, at the suggestion of only one of them, must be referred to the Central Committee. The business must not be transacted if the consent of a majority of the quorum of the committee cannot be secured.

In Section 41 of the Bank Act, page 52, the Empire reserves the right, at the expiration of 10-year periods, after one year's notice, (a) of discontinuing the Reichsbank and acquiring its property "on the basis of the book values, or (b) of acquiring the total stock of the Reichsbank at valuation." The Reserve Fund "is to be equally divided between the shareholders and the Empire."

In his introduction, Dr. Koch expresses the following opinions with regard to the Reichsbank:

(Page 18.) The economic and political position on which its special rights and duties rest is shown not only in the classification of its public duties but also in the close connection indicated by its name with the institutions of the Empire. Its management must not be governed solely, or even chiefly, by considerations of gain. Therefore, in order that the public welfare should be safeguarded, it must be subject to the "supervision and direction of the Empire."

On page 19 he says:

In its role of a central money custodian, a significant one for the economic life of the Empire, the Reichsbank stands distinctly



apart not only from ordinary banks but also from the "private note-issuing banks". Under this latter name the law allowed the other note banks to exist provisionally along with the Reichsbank.

Referring to banks other than the Reichsbank, he says (page 20):

The use of their notes for payments, as well as the carrying on of a banking business outside the state chartering them, are subject, however, to certain limitations which, in the main, apply also to the Reichsbank, both in regard to the right of note issue and to other forms of business. The "private note-issuing banks" are, furthermore, subject to the supervision of the Imperial Chancellor.

On pages 21, 22, and 23 Dr. Koch refers to various efforts which were made to change the character of the Reichsbank "into a pure state bank and to exclude private capital." These efforts at legislation were "met with unanimous opposition on the part of the state Governments, as well as on the part of a great majority in the Reichstag." Dr. Koch said that it was considered advisable "to leave it as a bank with private capital", but under the management and direction of the Empire. It was considered advisable; in order to enable the Reichsbank "to satisfy the greatly augmented demands of business in the future", to increase its capital, and, in order to guard against unfavorable experiences, to provide that the rate of discount of the "private note banks" "should not be lower than that of the Reichsbank."



As above stated, the authorship of the Notes is not clear. As Dr. Koch edited the Document, it is assumed that he is the author of the Notes.

In the Notes on the Introduction, page 54, the following is found referring to the Reichsbank:

54. Its chief duty (Section 12) lies in the management of the Imperial Treasury business (Sec. 22) and the obligation to purchase gold bullion at a fixed price (Sec. 25). It has the right to sell pledges (Sec. 20) and the privilege of limited exemption from state taxation (Sec. 21).

On the same page is the following:

58. Like the former Bank of Prussia, the Reichsbank was founded on private capital, and it is being separated from the Imperial Treasury as a specific legal person. Yet in spite of its few similarities to a stock company, it is a public institution of the Empire, and is subject to a special law.

In the Notes of the Bank Act of March 14, 1875, it is stated on page 71:

31. The Reichsbank holds a position different from that of the other banks ("private note-issuing banks", Chapter III). It is the central note bank of the Empire and must promote not only private but also public ends; hence in the public interest it is vested with certain rights which entail corresponding duties. It is, as the Imperial Court says, "a constitutional organ, a quasi-public Federal institution", and its administration, to-



gether with that of the branch institutions, is, therefore, closely connected with the Federal authorities.

On page 72 is the following:

34. The Reichsbank is thus separated from the Imperial Treasury, but it is not a stock company. It has its special law, namely, the Bank Act, and its Statute.

On page 78 is the following:

The slight similarity of the Reichsbank to stock companies is brought to light in section 23, according to which the Reichsbank is founded wholly on private capital. The Empire invested no capital and thus assumed no risk, but it granted the right of note circulation, and is directing and supervising the Bank.

On page 81-2, paragraph 93, reference is made to the authority of the Central Committee. It is suggested that in some instances they merely have an expression of opinion, in others they must be consulted, in other important matters their decision was final. It is stated that their consent is required "In matters for which provision is made by Section 32, paragraph 2d; Section 35 of the Bank Act; and Section 15, paragraph 2 of the Reichsbank Statute." These are all important provisions.

104. This is the condition under which the organs of the stock owners of the Bank are called upon to exercise an effective control instead of merely expressing an opinion (Sec. 32). The state governments can have no



more privileges than private business men. The provision is of fundamental significance for the independence of the Reichsbank in fiscal matters.

In the notes on the Reichsbank Statute, page 109, it is said:

1. The "Statute" of the Reichsbank has only a remote similarity to the statute of a stock company. As a supplement to chapter 2 of the Bank Act of the 14th of March 1875, it contains provisions in regard to the Reichsbank which might just as well have been contained in the Act itself. This arrangement, however, is plausible because it relieves the Act from detailed provisions which are for the most part regulative (cf., e.g., secs. 10, 11, and 13), and which have little to do with the relations of the bank shareholders, and also because it renders a supplement possible in a more convenient form.

The author then states that in 1900 a decree ordered that a series of sections of the statute be amended, "and such amendment was approved by the general meeting of the shareholders."

We believe that the above extracts from and references to the Laws, Introduction, and Notes found in the Document referred to, set out fairly what is to be found in the Document which might be said to have an important bearing on the character and status of the Reichsbank, as indicated by the Laws and interpreted by these opinions. It will be noted that nothing contained in these laws or in these opinions



in anywise tends to call in question the fact that the Reichsbank is a corporation organized under the laws of Germany, possessing the rights of a legal person, privately owned, and privately operated, so far as its general business is concerned, through the Central Committee elected by its stockholders, and by the supervisors elected by the Central Committee, who have, in the language of the Law (Section 34) "the permanent special control over the management of the Reichsbank."

These supervisors representing the stockholders have the final authority, acting with the Central Committee (Sec. 35, Bank Law) to limit the total business of the Reichsbank, including the right to limit or decline loans to the Empire or the States. Any change in the statutes must be approved by the general meeting of the shareholders. The Reichsbank is not what is designated in German Law a "stock company", because it has its special statute, instead of operating under the general statutes applying to so-called "stock companies." It is true that the Reichsbank was, by law, under the supervision of the Empire through a Board of Trustees who were appointed by the Government and who acted largely in an advisory capacity; also that the Empire had a certain direction over the Bank through the Chancellor and Board of Directors, but these officials could not be shareholders of the Reichsbank or vote at meetings of stockholders. Dr. Koch, in his Introduction, page 19, referring to this said, "Therefore, in order that the public welfare should be safeguarded,



it must be subject to the supervision and direction of the Empire." In the Notes on the Introduction, page 32, it was emphasized that the Bank was founded on private capital and "is being separated from the Imperial Treasury as a specific legal person." This separation from the Empire is further emphasized in the Notes on the Bank Act, paragraph 34, page 72, and also in the statement on page 78 that the *Empire invested no capital and thus assumed no risk*. Paragraphs 93 and 104, page 82, call attention to the provisions of the law under which the organs of the stockholders exercise an effective and in many important respects a final control, which is said to be "of fundamental significance for the independence of the Reichsbank in fiscal matters."

This document discloses nothing not already disclosed by the record except that the Reichsbank paid to the German Government a certain portion of its profits because of valuable privileges granted it, and that, on account of its important duties and responsibilities, it was subject to certain direction and control fixed by law (as are other banks). These facts did not make it a part of the German Government.

The document taken as a whole corroborates the evidence of record that the bank from its organization was privately owned, and as to its fiscal affairs, privately controlled, and was at all times separate and distinct from, and no part of, the German Government.

2. The closest domestic analogy to the Reichsbank as it was constituted prior to the law of 1924



(none of the officers have been appointed by the Government since that time, and the Government supervision is now comparatively limited) is to be found in the provisions of the Federal Reserve Act, creating the Federal Reserve Board and providing for the Federal Reserve Banks. The character of the Federal Reserve Banks, the direction, supervision, and control over them, their privileges, limitations, and obligations, are strikingly similar to those of the Reichsbank, as follows:

(a) Both the Reichsbank and the Federal Reserve Banks were created under a special statute and therefore, as to their character and privileges, are unlike any other organization, joint stock or otherwise, authorized under the law.

(b) Both the Reichsbank and the Federal Reserve Banks have a Board exercising supervision and direction, appointed by the Chief Executive, whose salaries are fixed and paid by the Government (Reichsbank Directors, "Direktorium": Federal Reserve Board), but the Federal Reserve Board has the power to assess to the Banks the cost of all its Salaries and Expenses. We find no similar provision in the German law.

(c) Both the Reichsbank and the Federal Reserve Banks have, as ex-officio chairman of this Board, a high official of the Government (Chancellor: Secretary of the Treasury).

(d) Both the Reichsbank and the Federal Reserve Banks have a supervisory or advisory Board which



meets four times a year (Trustees: Federal Advisory Council).

(e) Both the Reichsbank and the Federal Reserve Banks have bodies directly representing the stockholders or stockholding banks (Reichsbank, Central Committee, and Supervisors: Federal Reserve Bank, Directors). In the case of the Reichsbank, these bodies are elected exclusively by the private stockholders; in the case of the Federal Reserve Banks  $\frac{1}{3}$  of the Directors are selected by the general governing Board (Federal Reserve Board). These bodies must, in each case, meet frequently and are charged with the general administration of the Bank, and superintend and limit its business.

(f) Both the Reichsbank and the Federal Reserve Banks have their duties, privileges, obligations, and limitations defined in detail in the law creating them, and in many respects they are very similar.

(g) Both the Reichsbank and the Federal Reserve Banks issue tax-free notes which are similar in character. Each of said banks are free from all taxes except real estate taxes; each pays a considerable portion of its earnings to Federal Government. (The Reichsbank divides its earnings above a certain percent; the Reserve Banks pay all above a certain percent.)

(h) Both the Reichsbank and the Federal Reserve Banks are fiscal agents of their respective Governments; both are Government depositories; neither is paid for the work which it does for the Government.



(i) The compensation of the officers and employees of these organizations are either fixed by law (no compensation for members of the Reichsbank Central Committee), or are subject to approval, in the case of the Reichsbank, of the Directors, "Direktorium", and of the Federal Reserve Banks, of the Federal Reserve Board.

(j) Both the Reichsbank and the Federal Reserve Banks have succession for a definite period, but the Federal Reserve Banks may be sooner dissolved by Congress or a bank may be suspended or liquidated by the Federal Reserve Board, or its franchise may be forfeited by violation of the law. Should a Reserve Bank be dissolved, any surplus remaining after the payment of obligations and par value on its stock, becomes the property of the United States. In case of the discontinuance of the Reichsbank after its life period, the Government may acquire its property at book value and the stock at "valuation." The reserve is divided equally between the stockholders and the Government.

(k) Both the Reichsbank and the Federal Reserve Banks are—

1. Legal entities with a corporate seal;
2. Entities with power to make contracts; to sue and be sued, complain or defend, in the Courts of their respective countries.

There are many other striking similarities between these banks which it does not appear necessary to set out. No one, so far as we have been able to discover, has ever presumed to claim that the Federal



Reserve Banks were a part of the Government or that they were other than private banks as distinguished from public institutions, and this notwithstanding the fact that the American Government, through the Federal Reserve Board and its officials, has now, in a variety of respects, a wider and broader supervision and control over the branch banks than the German Government had over the Reichsbanks in 1917.

While the Courts, so far as we have been able to ascertain by careful search, have not passed on the question of the character and status of Federal Reserve Banks, as to whether they are public or private institutions, apparently because of the fact that no one had been found to assert in any suit that they were part of the Federal Government, officials who might readily qualify as experts have expressed opinions on the subject.

In an address delivered before the New York Chapter of the American Institute of Banking on November 1, 1916, W. P. G. Harding, then Governor of the Federal Reserve Board, said:

From a legal standpoint these banks are *private corporations*, organized under a special act of Congress, namely, the Federal Reserve Act. They are not, in the strict sense of the word, Government Banks, but are quasi-Governmental institutions in that they are under the general supervision of the Federal Reserve Board and have on their Board of Directors three men, representing the Government, who are appointed by the Federal Reserve Board. (Italics ours.)



In a booklet issued by the Federal Reserve Bank of Boston in August 1926 under the title "The Federal Reserve Bank; Its Relation to Banks, Business, and the Public", the following is found on page 27 under the heading, "What the Federal Reserve Bank is not":

One of the commonest inaccuracies encountered is a reference to a Federal Reserve bank as a "government bank." The reserve bank derives its charter from the Federal government, and it may be (and is) required to act as a fiscal agent of the government, but notwithstanding those facts a Federal reserve bank is hardly more a government bank than a national bank, which gets its charter from the same source and may also be called upon to act as a financial agent of the government. While the government taxes the earnings of the banks as related later in this chapter, participates in their management by appointing one third of the board of directors of each bank, and has an equity in their assets in the event of their liquidation, it does not own any of the stock in the Federal reserve banks, all such stock being owned by member banks as previously described in this pamphlet. The Federal reserve banks, though having important public duties to perform and though under the close supervision of a government board which has entire control of note issues and exercises control over general credit policies, are, so far as ownership goes, *private corporations*, wholesale banks whose stockholders are banks, which select two thirds of the governing boards of directors. (*Italic ours.*)



3. But even if it be assumed that the status and character of the Reichsbank was of such special or peculiar nature as to raise some question that it might, in some of its aspects, be considered of a quasi-public nature, it was, in fact and in law, a corporation and its stock was privately owned and its funds belonged to its shareholders through the corporation and none of its funds belonged to the German Government. Such being the facts, funds which belonged to the Reichsbank and which when seized by the Alien Property Custodian belonged to the Reichsbank were and are funds belonging to the Reichsbank, a corporation, under the provisions of the Trading with the Enemy Act and none of them were or are funds of the German Government under that Act.

The Trading with the Enemy Act as amended, provides in section 9 (b):

In respect of all money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, if the President shall determine that the owner thereof at the time such money or other property was required to be so conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or at the time when it was voluntarily delivered to him or was seized by him was—\* \* \*.

(13) A partnership, association, or other unincorporated body of individuals, having its principal place of business at such time within



any country other than Austria, Hungary, or Austria-Hungary, or a corporation organized or incorporated within any country other than Austria, Hungary, or Austria-Hungary, and that the written consent provided for in subsection (m) has been filed; or

\* \* \* \* \*

Then the President, without any application being made therefor, may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian or the Treasurer of the United States, or of the interest therein to which the President shall determine such person entitled, either to the said owner or to the person by whom said property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian.

Section 9 (c) provides that any person whose money or other property the President is authorized to return under the provisions of subsection (b) of section 9, may file notice of claim for the return of such money or other property and, if the claim is not allowed, may institute a suit in equity for the recovery of such money or other property.

The Reichsbank, claiming to be entitled to the return of its property under the above-quoted provisions of the Trading with the Enemy Act, filed its notice of claim in due form and containing such particulars as required by the rules and regulations of the Alien Property Custodian, and thereafter instituted its suit, Equity No. 51,537, as provided for by the statute.



The Reichsbank alleged in its Bill of Complaint under paragraph 1—

That it is now and has been since prior to April 6, 1917, a private corporation, organized and existing under and by virtue of the laws of Germany, carrying on a general banking business.

This allegation was admitted in the answer (R. 29). Therefore the only question of law which the Court had to decide in said suit was whether or not the Reichsbank being a private corporation was entitled to the return of its property under the provisions of the Trading with the Enemy Act.

*It will be noted that the statute does not use the words "private corporations" but uses the word "corporation", thereby not limiting the right of the return of property to any kind or class of corporations. (Section 9, subsection (b) par. 13, Trading with the Enemy Act, as amended.) The only limitation contained in the statute is that the claimant corporation was the owner of the property at the time of seizure and that it was a corporation "organized and incorporated within any country other than Austria, Hungary, or Austria-Hungary." The statute is all embracing and authorizes the return to any corporation organized within any country other than Austria, Hungary, or Austria-Hungary.*

That Congress did not intend for the courts or the Alien Property Custodian to inquire into the stock ownership of any claimant corporation "organized or incorporated within any country other than



Austria, Hungary, of Austria-Hungary" even though the German Government might have some interest in or control over said corporation, is conclusively established by the provisions of subsection (p) of Section 9 of the Trading with the Enemy Act, as amended, which reads as follows:

The Alien Property Custodian shall transfer the money or other property in the trust of any partnership, association, or other unincorporated body of individuals, or corporation, the existence of which has terminated, to trusts in the names of the persons (including the German Government and members of the former ruling family) who have succeeded to its claim or interest; \* \* \* each such successor (except the German Government and members of the former ruling family) may proceed for the return of the amount so transferred to his trust, in the same manner as such partnership, association, or other unincorporated body of individuals, or corporation might proceed if still in existence.

It is therefore clear that Congress did not intend for the Alien Property Custodian or the courts to look behind the corporate entity of any corporation still in existence. There is not one word in the Trading with the Enemy Act indicating such an intention, or which could be construed as authorizing such action.

The United States Supreme Court, prior to the passage of the provisions of the statute under which the Reichsbank claims to be entitled to its funds, had held in the case of *Behn, Meyer & Company, Limited*



vs. *Thomas W. Miller*, as Alien Property Custodian, et al., 266 U.S. 457, that a corporation organized and existing under the laws of the Straits Settlements, a crown colony of the United Kingdom of Great Britain and Ireland, was not an enemy or ally of an enemy under the terms of the Trading with the Enemy Act even though practically all of its stock was owned by citizens of Germany; that the Custodian could not look behind the corporate entity. Therefore, the maxim "*Expressio unius est exclusio alterius*" is applicable, 222 U.S. 513. It is therefore clear that the Reichsbank is entitled to the return of its property if it is a corporation and has a separate entity from that of the German Government.

The record establishes conclusively that the Reichsbank is a corporation organized and created under and by virtue of a law of Germany; that the German Government owns none of its stock. The question then remains, is the Reichsbank a part of the German Government. Neither the plaintiff nor the defendant pleaded or proved any foreign law. Therefore, the question of the status and character of the Reichsbank must be determined by the laws of the United States.

The analogy of the Reichsbank with the Federal Reserve Banks has been reviewed. The fact that no one has even assumed to claim that the Federal Reserve Banks are a part of the Government of the United States or that their funds are the funds of the United States should, in our opinion, be given great weight by the Court. We have heretofore set



forth the opinions of experts as to the character and status of the Federal Reserve Banks.

That the word "private" in describing a corporation privately owned and having a distinct legal entity from the Government is correct, has been established by numerous decisions of the courts of this country. In the concurring decision of Justice Story, in the case of *Dartmouth College vs. Woodward*, 4 Wheat. 518-669, it is said:

"Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests; but strictly speaking, public corporations (699) are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder or the nature and objects of the institution. For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So a hospital created and endowed by the government for general charity. But a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the



government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private; as much so, indeed, as if the franchises were vested in a single person."

In the case of the *Bank of the United States vs. The Planters' Bank of Georgia*, 9 Wheat. 903, Chief Justice Marshall, who delivered the opinion of the Court, said:

"The state does not, by becoming a corporation, identify itself with the corporation. The Planters' Bank of Georgia is not the state of Georgia, although the state holds an interest in it.

"It is, we think, a sound principle, that when a Government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."

No one would be so bold as to assert that a national bank organized under the laws of the United States was not a private corporation, or that it was a part of the United States although, they have been described in numerous decisions of the courts as



being instrumentalities of the Federal Government, created for a public purpose.

The Courts of this country have uniformly held that corporations organized and existing under either a special statute or a general statute, in which corporations the Government owned either a part or all of the stock, were private corporations, separate and distinct from the Government, and that they were no part of the Government.

In the case of *Curran vs. Arkansas et al*, 15 Howard 304, it was held that a corporation all of the stock of which was owned by the Government, was a distinct entity, and not a governmental department or arm of the Government. In that case the legislature of the State of Arkansas passed a Bill providing for the incorporation of a Bank of the State of Arkansas, the capital stock of which was paid in by the State. The Bank became insolvent and the legislature passed certain laws requiring part of the assets of the Bank to be transferred to the State or expended for State purposes. The plaintiff brought suit in Equity against the State of Arkansas, the Bank, and certain State officials for the purpose of following the transferred assets of the Bank and impressing them with a lien in his favor. The Court below sustained a demurrer to the Bill which the Supreme Court overruled, and in the course of its opinion said:

And first, as to the character of the parties, by the charter of this bank, the State of Arkansas became its sole stockholder. But the bank was a distinct trading corporation,



having a complete separate existence, enabled to enter into valid contracts binding itself alone, and having a specific capital stock, provided, and held out to the public as the means to pay its debts. The obligations of its contracts, the funds provided for their performance, and the equitable rights of its creditors were in no way affected by the fact that a sovereign State paid in its capital and consequently became entitled to its profits. When paid in and vested in the corporation, the capital stock became chargeable at once with the trusts, and subject to the uses declared and fixed by the charter, to the same extent, and for the same reasons, as it would have been if contributed by private persons.

That a State, by becoming interested with others in a banking corporation, or by owning all the capital stock, does not impart to that corporation any of its privileges or prerogatives, that it lays down its sovereignty so far as respects the transactions of the corporation, and exercises no power or privilege in respect to those transactions not derived from the charter, has been repeatedly affirmed by this Court, in *The Bank of the United States v. Planters' Bank*, 9 Wheat., 904; *Bank of Kentucky v. Wistar et al*, 3 Pet. 431; *Briscoe v. Bank of Kentucky*, 11 Id. 324; *Darrington et al v. The Bank of Alabama*, 13 How. 12. And our opinion is, that the fact that the capital stock of this corporation came from the State, which was solely interested in the profits of the business, does not affect the



complainant's right, as a creditor, to be paid out of its property;

In the case of *Briscoe et al. v. Bank of the Commonwealth of Kentucky*, 11 Pet. 257, the Court, in its decision, propounded certain questions as follows:

The State of Kentucky is the exclusive stockholder in the Bank of the Commonwealth: but does this fact change the character of the corporation? Does it make the Bank identical with the State: And are the operations of the Bank the operations of the State?

The Court then proceeds to say, "The answer to these inquiries will be given in the language of this Court, used in former adjudications." The Court then proceeds to quote the portion of the opinion in the case of *The Bank of the United States v. The Planters' Bank*, which is quoted above.

In the case of *Louisville, Cincinnati, Charleston R.R. Co. v. Letson*, 2 Howard 495, the State of South Carolina was, as stated by the Court, "a member" of the above railroad corporation, and said referring to the *Planters' Bank* case:

South Carolina stands in the same attitude in the case before us, that Georgia did in the case in 9 Wheat.

In a number of cases involving the Emergency Fleet Corporation, the stock of which was entirely owned by the Government, it has been held that the corporation "is not a governmental department, or arm of the government possessing sovereignty"; that this corporation is "a private business corporation";



that it "is not a governmental establishment"; that "notwithstanding all its stock was owned by the United States, it must be regarded as a separate entity"; and further that the fact that "The United States took all the stock did not affect the legal position of the company, etc."

In the case of the *Providence Engineering Corporation v. Downy Ship Building Corporation* decided by the Circuit Court of Appeals, second circuit, November 5, 1923, 294 Fed. 641, the Court said at page 646:

The distinction between public and private corporations is important, for the rules of law applicable to the one class of corporations are different in many respects from those which are applicable to the other. In general, a public corporation is one created for a political purpose. \* \* \* But while The Fleet Corporation may have been created and controlled by the government for its own purpose, it by no means follows that such corporation is in effect the government, and so not subject to the rules of law governing other corporations. A government, engaging in a particular business through the instrumentality of a corporation, may divest itself pro hac vice of its sovereign character, so as to render the corporation liable in the same way that a private corporation is liable.

The Court then quotes *The Planters' Bank* and other cases heretofore referred to and says (page 648):

(3) We see no adequate reason for holding that this corporation was other than a private business corporation.



A writ of certiorari was applied for in this case and denied.

In the case of *United States v. Matthews*, 282 Fed. 266, the Court said (p. 267):

The question presented for decision is whether the action should have been instituted by and in the name of the Emergency Fleet Corporation, instead of in the name of the United States. Since the decision of the Supreme Court in the allied cases of *Sloan Shipyards Corporation et al., v. United States Shipping Board Emergency Fleet Corporation and the United States of America*, *Astoria Marine Iron Works v. United States Shipping Board Emergency Fleet Corporation*, and *United States Shipping Board Emergency Fleet Corporation, representing the United States of America, v. Roger B. Wood, Trustee in Bankruptcy*, 258 U.S. —, 42 Sup. Ct. 386, 66 L.Ed.—, there would seem to be no further question that the Fleet Corporation is not a governmental department or arm of the government possessing sovereignty, and that, while it is an entity capable of suing and being sued, it is a mere agent for carrying out the powers delegated to it by Congress, either directly or through the authority conferred upon the President.

In the case of *Pope v. The United States Shipping Board Emergency Fleet Corporation*, decided in the District Court, S.C. Florida, April 15, 1920, 269 Fed. 319, the question was, "Can the Shipping Board Emergency Fleet Corporation be sued; or, is it such



a governmental establishment as exempts it from a suit?" The Planters' Bank case was referred to in the decision, relative to which it was said:

This decision was by Chief Justice Marshall, and, so far as I am aware, has never been overruled or modified, nor do I think that the fact that the State was not the sole stockholder, as is the case in the present suit, material.

In the case of *The United States of America v. James H. Strang*, 254 U.S. 491, the question was whether the employment of defendant Strang as an inspector by the United States Shipping Board Emergency Fleet Corporation made him an agent of the Government within the meaning of paragraph 41, Criminal Code. The plaintiff claimed that Strang was, and acted, as an agent of the Government. To this Strang demurred, which demurrer was sustained by the District Court, and the Supreme Court held that the demurrer was properly sustained. In his decision Justice McReynolds said, (p. 369) referring to the Emergency Fleet Corporation:

Notwithstanding all its stock was owned by the United States, it must be regarded as a separate entity.

In the case of *Sloan Shipyards Corp. v. United States*, 258 U.S. 549, (the court in this decision decided three other similar cases presenting the same question in different ways) Justice Holmes in delivering the opinion of the Court said:

These cases present in different ways the question of the standing of the United States



Shipping Board Emergency Fleet Corporation  
in the Courts. \* \* \*

The United States took all the stock, but that did not affect the legal position of the Company (*United States v. Strang*).

They have suggested the argument that it was so far put in place of the Sovereign as to share the immunity of the Sovereign from suit otherwise than as the Sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. \* \* \*

The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person, whatever indemnities might be furnished by the United States.

One of the cases decided was a claim of priority in bankruptcy, presented by the Fleet Corporation on the ground that it was an instrumentality of the Government of the United States, where the Court referred to the fact that this claim of being an instrumentality of the Government of the United States was

denied successively by the referee, the district court, and the circuit court of appeals on the ground that the Fleet Corporation was a distinct entity, and that, whatever might be the law as to a direct claim of the United States, the Fleet Corporation stood like other creditors and was not to be preferred.

This position was sustained by the Court.



**The Appellant's Contention That the Court Erred in Refusing to Grant his Motion to Take Further Testimony**

Under Point IV of his Brief (pp. 58-64) appellant sets forth and argues his Assignments of Error 14 to 18 inclusive, to the effect that the Court erred in refusing to grant his motion to take further testimony.

The argument is made that a stipulation may be vacated for mistake or inadvertence and that it may be vacated to prevent injustice. Naturally when it clearly appears of record that that which is stipulated to be a fact is not a fact, the Court may and should relieve the parties of their stipulation of such alleged fact.

But such is not the situation here. As we pointed out hereinbefore, it is clear that counsel for appellant deliberately entered into the Stipulation of October 24, 1930 on the apparent theory that while the evidence stipulated showed conclusively that the monies were the property of the Reichsbank, a private corporation doing a general banking business, yet he apparently believed that it would sustain the theory of his case, namely, that whether or not the Reichsbank was a corporation, it was not acting as a private corporation but was a part of the German Government "in the matters alleged" in his Bill of Complaint. It was only after the case had been fully closed and while counsel was arguing the same to the trial court that he apparently came to the conclusion that such



stipulated evidence would not sustain his theory and that he then handed the book or pamphlet to the Court and later, on May 8, 1931 (R. 13), filed his amended motion for leave, not to take *testimony*, but for leave to take *further testimony*. This does not disclose mistake or inadvertence; rather does it disclose an attempt to hold to the stipulation and at the same time to impeach and avoid the evidence so stipulated in whatsoever manner might be deemed to suit the needs of appellant to the direct prejudice of the appellees.

Furthermore, the record shows that the further evidence which appellant proposed to place in the record should his motion for leave be granted was set forth in the exhibits attached to such motion (R. 14); that the trial court considered such evidence (R. 15); that appellant was given leave to stipulate the same into the record should appellees agree or, if counsel were unwilling, then the Court would rescind the order of consolidation and that counsel could then proceed with this case as they might be advised (R. 15); that counsel filed a specific election to have the order of consolidation continued (R. 16); that, thereafter and on April 27, 1932, such evidence was stipulated into the record (R. 17); and that it was a part of the record and so considered by the trial court when the Findings of Facts were made and entered by the Court on April 28, 1932 (R. 18).

Finally, counsel urge that the stipulation was broken by the Reichsbank. The Reichsbank was not a party to the stipulation and it is clear that whatever



was done in Equity No. 51537 by the Reichsbank cannot be complained of by appellant in this case. And further it is clear that the two documents admitted in evidence in Equity No. 51537 were merely cumulative of other evidence in that case which other evidence had been stipulated into this case as the evidence of appellant.

We respectfully submit that Point IV as made by appellant in its Brief is not well taken.

## V

### **The Appellant Is Precluded in this Suit from Satisfying Its Claim against Any Monies which May Be in the Hands of the Alien Property Custodian to the Credit of the German Government**

Appellant asserts under Point V of its Brief (p. 64) that "even though it should be found that the money in controversy belongs to the Reichsbank the court erred in dismissing appellant's bill of complaint because said finding does not preclude appellant from satisfying its claim against other monies of the Imperial German Government in the hands of the Alien Property Custodian."

The contention is so obviously unsound that we will not burden the Court with an extended discussion in refutation thereof. Suffice it to say that this suit was brought not only against the Alien Property Custodian and the Treasurer of the United States, but also against the Reichsbank; that it is clearly and specifically alleged that certain specified funds claimed to be owned by the Reichsbank are in



fact owned by the Imperial German Government; that recovery is here sought from said specific funds; and that the specific prayer is made that "said Reichsbank be enjoined from asserting any right, title, or interest in or to *said monies* or any part thereof."

Obviously, the Court could not, in a suit to recover from specific funds, enter a valid decree in favor of appellant for a recovery from funds not involved in this suit.

For the reasons herein set forth, appellees ask that the decree be affirmed.

#### CONCLUSION

The decision of the trial court in dismissing the Bill of Complaint filed in this case is sustained by a preponderance of the admitted evidence, and, therefore, no error was committed.

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